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ABSTRACT

This publication is a study of federal court decisions as they affect the equal rights of women in education. Because the majority of such cases have involved employment, the main focus of the study is on that area. Primary objective of the study is to derive from relevant federal cases the basic judicial principles applicable to the concept of equal rights for women in education. An effort has been made to present these principles in clear, nontechnical language easily understood by laymen. The study is organized in two parts: one contains the nontechnical presentation of overall findings, and the second, consisting of extensive appendixes, supplements and provides the source for the first part. (Author/JG)

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An Overview of Federal Court Decisions Affecting Equal Rights for Women in Education

Report Number 70
From the Equal Rights for Women in Education Project

Ford Foundation Grant

Prepared by William Pearson

Education Commission of the States
Denver, Colorado 80203
Wendell H. Pierce, Executive Director

June 1975

EA 007 395

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FOREWORD

The Equal Rights for Women in Education Project has been deluged with requests for more specific information about the law as it affects women in education since the publication of our "A Digest of Federal Laws: Equal Rights for Women in Education." This booklet is in response to these requests.

We would like to thank William Pearson, who was indispensable to the completion of this project. He conducted all the research and prepared this publication.

To Dr. Terry Saario of the Ford Foundation we would like to convey our appreciation for her continued interest and support.

Paula Herzmark
Project Director
Equal Rights for Women in Education

INTRODUCTION

Origins

In early 1975, the Equal Rights for Women in Education Project, funded by the Ford Foundation through the Education Commission of the States, retained a legal consultant to make a study of federal court decisions as they affect the equal rights of women in education. This is that study.

Rationale

Various federal laws now prohibit sex discrimination in one or more aspects of education. But what a law says is one thing, what a court says about its interpretation and application is often another. Moreover, judge-made law also operates outside statutory parameters. A need was therefore felt to supply a definitive overview of federal court decisions in this new and fast-moving area of contemporary jurisprudence.

Focus

Laws prohibiting sex discrimination can affect the rights of women in education as employees, as self-employed specialists, and as students. Each of these areas is important, but because the cases decided to date are overwhelmingly employment cases, the main focus is in this area.

Goals

This study has had two overriding goals:

1. To make an intensive, expert sweep of the relevant federal cases and derive from them the judicial principles applicable to the concept of equal rights for women in education.

2. To present the results of this sweep and derivation of principles in nontechnical language easily understood by lay users of resources developed by the Equal Rights for Women in Education Project. This entails difficulties and risks. Not all legal language, particularly at the decisional level, can be translated into relatively clear, precise English. Legal phrases and words of art acquire certain inevitable nuances. It has been necessary to strike a judgmental balance between the goal of clarity and the dangers of oversimplification.

Users

This study has been prepared for all lay users of project facilities. Though addressed to individual women in education, it is also intended to be a resource tool for women's groups, educators, administrators, legislators, and personnel of state agencies concerned with the educational delivery system.

Uniqueness

To the best of the consultant's knowledge, there is no other present single source for the specialized material contained herein.

Limitations

Time, funding, and the necessity to present the research findings in a reasonably compact publication limit the total presentation. It would be possible, for example, to write many hundreds of pages on Title VII of the

Civil Rights Act of 1964 alone. The same is true of other covered topics. The study therefore cannot be exhaustive as to all aspects of each law or principle discussed. On the other hand, all basic, relevant data is noted.

Scope

For the reasons stated under Limitations, this study cannot deal exhaustiveiy with all existing problems and material. By way of example, a 1972 computer printout by the Department of Justice revealed that over 800 sections of the United States Code contained sex-based references--and these do not include those sections that lack such references but are nevertheless discriminatory in application.

Outside the scope of this study, accordingly, except as incidentally mentioned, are:

1. State laws and court decisions.
2. Remedial and procedural problems, and class actions to the extent not included in the foregoing
3. "Pattern or practice" litigation.
4. Consent decrees, such as the well-known Philadelphia decree entered into by the American Telephone and Telegraph Company and the Equal Employment Opportunity Commission.
5. Discrimination against minorities.
6. Reverse discrimination (i.e., situations where men allege discrimination because women receive preferential treatment).
7. Employment quotas.
8. Women's rights in other areas, such as, but not limited to, family law, name changes, and abortion.
9. All laws directly or indirectly mentioned in the last appendix to this study, Appendix V.
10. Pending and settled cases.

Format

This study is in two parts. Part I contains the nontechnical presentation of overall findings. Part II, consisting of extensive appendices, authenticates, supplements, and provides the source for Part I.

How To Use This Study

The following is noted as an aid to utilization of this study as a whole:

1. The appendices, written in a more legalistic style, are difficult and complicated, but lay users do not have to read them in order to derive the intended benefits. Those users, however, who wish more information on certain points or who have special interests in the whole field of sex discrimination will find them particularly useful, since they are far more extensive and detailed than Part I.

   Those who do read them do not have to read them in order, but each is written on the assumption a reader is familiar with previous appendices. In any event, however, it is desirable to have read Appendices A, A-1, and C before proceeding with later material.

2. At the end of Part I, there is a quick-reference summary of essential Part I material.

3. All cases referred to in Part I, unless otherwise noted, are federal court cases. Whether designated by case title or without, all such cases are fully cited in the appropriate appendix dealing with the same subject matter.

Caveat

Though prepared by a lawyer, this study is not intended to offer legal advice. Nor is it intended to be a do-it-yourself kit for lay users. There is no substitute for legal advice at every stage of an actual or prospective problem, and every user with such a problem should seek such advice from an attorney of his, her, or its own choosing.

William Pearson

PART I

RESOURCE SURVEY OF FEDERAL COURT DECISIONS AFFECTING EQUAL RIGHTS FOR WOMEN IN EDUCATION

Woman's Rights Convention--A convention to discuss the social, civil and religious rights of woman will be held in the Wesleyan Chapel, Seneca Falls, New York, on Wednesday and Thursday, the 19th and 20th of July current * * *.

Announcement in the July 14, 1848 issue of the Seneca County Courier, Seneca Falls, New York

We hold these truths to be self-evident: that all men and women are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness * * *.

The history of mankind is a history of repeated injuries and usurpations on the part of man toward women, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but scanty remuneration. * * * As a teacher of theology, medicine, or law she is not known.

He has denied her the facilities for obtaining a thorough education, all colleges being closed against her.

Excerpts from the Declaration of Principles, Seneca Falls Convention, July 19-20, 1848

> In America, more than anywhere else in the world, care has been taken constantly to trace clearly distinct spheres of action for the two sexes, and both are required to keep in step, but along paths that are never the same. You will never find American women in charge of the external relations of the family, managing a business, or interfering in politics * * *.
>
> de Tocqueville, Democracy in America (1835)

HISTORICAL INTRODUCTION: THE FLOWERING OF ROMANTIC PATERNALISM

Just over a hundred years ago, Myra Bradwell of Illinois astonished the Illinois Supreme Court by asking to be permitted to practice law in that state. Her application was rejected with dispatch--the legislature, the court was sure, had never intended that this privilege should extend equally to men and women--and Mrs. Bradwell thereupon appealed to the United States Supreme Court. She was being denied, she said, one of the privileges and immunities of citizenship guaranteed by the Constitution.

The state of Illinois did not even bother to be represented by counsel, and fared none the worse for its cavalier self-confidence, for the Supreme Court held that the right to practice law was not one of the privileges and immunities of citizenship. In a famous (or perhaps infamous) concurring opinion, Mr. Justice Bradley explained why this should be so:

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood * * *. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Two decades after Justice Bradley's fortuitous discovery of the Law of the Creator, Belva Lockwood applied to the state of Virginia to practice law there. Belva Lockwood had been the first woman admitted to the bar of the United States Supreme Court and was a member of the District of Columbia bar, as well as that of several states. Virginia had a statute providing for the automatic admission of any "person" admitted to practice in the District of Columbia or any state, but the state's highest court decided a woman was not a "person" within the meaning of the statute, and in due course the decision was upheld by the United States Supreme Court.

Yet on April 15th, 1975, almost exactly a century after the judicial enunciation of the Law of the Creator and the unfitness of the female sex for many of the occupations of civil life, the present Supreme Court would say through Justice Blackmun:

> No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. * * * Women's activities and responsibilities are increasing and expanding. * * * The presence of women in business, in the professions, in government and, indeed, in all walks of life * * * is apparent and a proper subject of judicial notice.

How did we get from the romantic paternalism of Justice Bradley to the implied egalitarianism of Justice Blackmun?

There are many answers, of course, and though the cultural and similar forces largely responsible for the changed judicial climate are outside the scope of this study, a passing glance at women's culturally assigned

status in nineteenth-century society is appropriate. As Ashley Montagu has said:

> In the nineteenth century it was fairly generally believed that women were inferior creatures. Was it not a fact that women had smaller brains than men? Was it not apparent to everyone that their intelligence was lower, that they were essentially creatures of emotion rather than of reason--volatile swooning natures whose powers of concentration were severely limited and whose creative abilities were restricted almost entirely to knitting and childbirth? * * * Women had practically no executive ability, were quite unable to manage the domestic finances, and, as for competing with men in the business or professional world, such an idea was utterly preposterous, for women were held to possess neither the necessary intelligence nor the equally unattainable stamina. Man's place was out in the world earning a living; woman's place was definitely in the home.

In the early nineteenth century, moreover, the Industrial Revolution was changing traditional patterns of labor, particularly with respect to work formerly done (by both men and women) at home. Women at the lower end of the economic scale gradually began moving into the textile mills and small factories the new age of machinery was making possible, sometimes at half the pay men in another part of the same building might be receiving.

It would be redundant here to cite the familiar and appalling statistics on the long hours worked, the low wages paid, and the sweatshop conditions encountered in the new industrial environment, but as the century drew to a close, women activists, among others, set about persuading the states to pass laws intended to shield women from the harsher aspects of the new environment. These so-called "protective laws," regulating such matters as the hours women could work, the weights they could lift, and sometimes the specific occupations in which they could engage, are today--through one of those curious and not uncommon historical turnabouts--generally opposed by women activists, because experience has demonstrated such laws tend to limit employment opportunities.

But at the end of the nineteenth and beginning of the twentieth century, this was a nonexistent issue. The key question then was, were such legislative intrusions into business and commerce constitutional? The answer came in 1908, when the U.S. Supreme Court upheld an Oregon maximum-hours law for women. There were echoes of Justice Bradley's romantic paternalism in the Court's opinion:

> That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. * * *
>
> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained. (Emphasis supplied.)

The underlined words in the above quotation are worth noting, because they suggest a legal concept important to an understanding of the methodology courts employ in ruling on certain kinds of constitutional challenges to alleged sex discrimination. That legal concept is the idea of "permissible classification." Thus, the Court in 1908 was saying it was constitutionally permissible for a state to classify men and women differently with respect to the maximum number of hours it allowed them to work. And why was it permissible? Because, said the Court, women were weaker than men, less able to fend for themselves, and it was therefore reasonable, as measured by prevailing social values, for a state to pass laws extending them extra protection. (In the decades to follow, however, this paternalistic concern for the "weaker" sex would not deter the same judges who upheld protective laws dealing with maximum hours from striking down--until 1937--protective laws providing minimum wages for women. This kind of legislation, it seemed, interfered with the right of employers and their female employees, already judicially categorized as less able to fend for themselves in the business

world than men, to negotiate a business bargain.)

HISTORICAL INTRODUCTION: THE EQUAL PROTECTION CLAUSE

It is timely now to explore the relationship, in sex discrimination cases, between "permissible classification" and the equal protection clause of the Constitution's Fourteenth Amendment, which provides in part that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

Like many constitutional mandates, the quoted language is at once broad, hortatory, and vague, but the starting point to any analysis of its meaning is the firm realization the equal protection clause is not a shield against private conduct, no matter how discriminatory or wrongful. It is a shield only against state action. The courts, however, have extended this concept of "state action" to include action taken by schools, universities and similar entities in the private sector if it can be shown that the state is significantly involved with their activities. Later sections of this study will take up the subject in more detail.

The courts have long puzzled over the relationship between "permissible classification" and the equal protection clause. At various times, they have applied two distinct tests for determining whether some particular action by a state (often simply the enforcement of a law) is constitutionally prohibited. The tests can be roughly characterized as follows:

1. The "reasonableness" or "rational basis" test. This test asks two questions: did the state have a constitutionally permissible purpose in passing the law, and is the classification employed in the law used reasonably to further that purpose? In this test, if any set of facts can be conceived that would give the law a permissible purpose, then the existence of that set of facts must be assumed; the person challenging the law then carries the burden of showing the law's classification does not reasonably carry out its purpose.

2. The "strict judicial scrutiny" test. This test is applied where a court has decided that the classification employed in the law under challenge is "inherently suspect" (such as classifications based on race) or affects a fundamental right (such as the right to vote). This test asks two different questions: did the state have a purpose of overriding public importance in passing the law, and is the classification established by the law necessary to accomplish that purpose? When "strict scrutiny" is used, the facts necessary to sustain the law will not be assumed (as in the "rational basis" test) and must be demonstrated. In addition, the state bears the burden of proof on whether less drastic alternatives are simply not available.

If one compares these two tests, it becomes apparent a plaintiff has a much better chance of successfully challenging an allegedly discriminatory state law if a court can be persuaded to use the "strict scrutiny" test, not only because the defendant has the burden of justifying the classification used in the law, but also because the court will carefully examine the justification itself.

In the six decades after the Oregon case mentioned above, the Supreme Court applied the first, or "rational basis," test to all equal protection cases involving alleged sex discrimination with respect to a state law, and no plaintiff ever prevailed. But in 1971, the tide seemed to turn. The Court for the first time struck down an Idaho law on the ground it discriminated against women.

The law in question said men were to be preferred over women when two individuals, one a man, the other a woman, were otherwise equally entitled by statute to manage the business problems involved in settling the estate

of a deceased relative of both. Implicit in the law was an assumption that men would generally look after such estates better than women, but attorneys for Idaho also made the argument the classification by sex was justified because it eliminated the necessity for a time-consuming, possibly fractious court hearing on which of two competing applicants was actually better qualified. But the Court said that to give this kind of preference to men merely to eliminate a court hearing was to make the very kind of arbitrary legislative choice forbidden by the equal protection clause. A classification of this kind had to rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

While the case did not go so far as to declare sex a suspect classification, requiring strict or close judicial scrutiny, it nevertheless moved away from the traditional "rational basis" test of sex discrimination cases, because under the traditional test a justification such as the administrative convenience of eliminating a court hearing would have been sufficient to uphold the challenged classification.

In a 1973 case, however, a plurality (but not a majority) of the Court did declare sex, like race, to be a suspect classification. It was a significant step, though on closer analysis not as significant as some women's rights' advocates had at first hoped, because subsequent decisions in 1974 and early 1975, often favorable to women, nevertheless demonstrated that a majority of the Court was unwilling to accept the philosophy espoused by that plurality. (The relevant recent decisions are discussed in Appendix A.)

To summarize the current status of equal protection doctrine as applied in sex discrimination cases, it is clear the Supreme Court has abandoned the paternalistic approach of the 1908 Oregon case mentioned earlier. Discarded, too, is the traditional "rational basis" test, in which a challenged law would be upheld if any set of facts could be conceived that would sustain it. In its place--beginning with the 1971 Idaho case--is a new standard of review, somewhere between "rational basis" and "strict scrutiny." In applying this standard, a court will examine not only the purpose of the legislative classification but also the underlying assumptions on which it is based, and archaic and overbroad sex-based generalizations employed in such assumptions will not be sustained.

The practical result of the movement toward a standard review more demanding than the traditional "rational basis" test is beneficial to all women plaintiffs in sex discrimination cases brought on equal protection grounds--as evidenced by the Supreme Court cases won in this area since 1971. (See Appendix A.) The next great change will come if and when a majority of the Court finds sex to be a suspect classification.

HISTORICAL INTRODUCTION: POST-CIVIL WAR CIVIL RIGHTS ACTS

In the years following the Civil War, Congress passed several laws intended both to implement various constitutional amendments designed to ensure the freed slaves their rights and to prevent intimidation of freed slaves, federal officers, and others by the Ku Klux Klan. These laws have been used historically to combat racial discrimination, and some of them, though probably never intended originally to apply to sex discrimination,

have been so applied in the recent past. Like the equal protection clause, then, these laws are fundamental to an understanding of current legal developments involving sex discrimination.

Three of these laws pertinent to this study are Sections 1981, 1983 and 1985(3) of Title 42 of the United States Code.

In rough paraphrase, Section 1981 provides that every person shall have the same right to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

Section 1983, in similar rough paraphrase, provides that every person who, under color of law, subjects any other person to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws can be sued by the injured party.

Section 1985(3) provides that if two or more persons conspire for the purpose of depriving any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, and if one or more persons engaged in the conspiracy do any act in furtherance of the conspiracy, whereby someone else is deprived of exercising any right or privilege of a citizen, the party so deprived may sue any one or more of the conspirators for damages.

With respect to these laws, the courts have said:

1. They have not been repealed by implication by other laws--such as Title VII of the Civil Rights Act of 1964--dealing with the same subject matter.
2. Relief may be pursued concurrently and in conjunction with Title VII, supra.
3. State procedures need not be exhausted before bringing suit under these laws.
4. The courts will apply the appropriate state Statute of Limitations in actions brought under them.
5. Back pay, reinstatement, and injunctive relief are available as remedies.

Each of the three will be briefly discussed below.

Section 1981

A number of courts have held that Section 1981 prohibits private employment discrimination on the basis of race. However, most courts that have considered the issue of whether Section 1981 prohibits similiar discrimination based on sex have concluded it does not. Notwithstanding these cases, the argument has been made that the statute should be liberally interpreted, so as to make it applicable to the employment rights of women.

Section 1983

The greatest number of cases involving alleged sex discrimination in violation of equal protection concepts have been brought under Section 1983. In dealing with such cases, the courts have to make an initial determination as to whether the defendant is a "person" within the legalistic meaning of the statute itself, and whether the defendant has been acting "under color of law." If the answer is negative to either of these two questions, the plaintiff fails to make her case.

As to the first determination, there has been considerable litigation on whether school districts, for example, are technically "persons" within the meaning of the section, and cases exist on both sides of the question. Moreover, some courts recognize school districts as "persons" for purposes of "equitable" relief (such as reinstating an improperly discharged teacher), but not for purposes of assessing money damages. Yet even where a school district is not recognized as a "person" as far as damages are concerned, it has been held that certain officers of the district could be held liable for the relief being sought.

The basic question is complicated by the fact that in 1973, the Supreme Court said a municipal corporation[1] was not a "person" within the meaning of Section 1983, regardless of whether the relief sought was damages or equitable relief. To the extent a state law makes a particular school district something in the nature of a municipal corporation, it thus would not be a "person" within Section 1983.

On the other hand, in 1974 the Supreme Court refused to review a case where it had been held, without discussion, that a local board of education was not a municipal corporation and thus was not outside the reach of Section 1983. Furthermore, the Supreme Court has decided other cases in which equitable relief was sought under Section 1983 against a school board, without discussion of whether the school board was a "person" within the meaning of the section.

The second initial determination in a Section 1983 action, namely, whether the defendant was acting "under color of law," has consistently been treated as being identical with the determination of whether there is "state action" under the equal protection clause, as discussed earlier. It is in order now to note some of the extremely generalized ground rules.

Basically, the courts determine the degree of state involvement necessary to invoke the equal protection clause almost on a case-by-case basis. The Supreme Court, in fact, has taken note of the difficulty of making such a determination, as follows:

> (T)o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "this Court has never attempted." * * * Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

Some lower courts have tried to be more precise. In 1974, a district court deliberating the claim of a female professor at the University of Pennsylvania that she had been denied promotion and tenure because of her sex, enumerated five factors material to a determination of whether the university was acting under color of state law within the meaning of Section 1983:

1. The degree to which the university was dependent on state aid.
2. The extent and intrusiveness of the state regulatory scheme.
3. Whether the scheme connoted state approval of the activity or whether the assistance was merely provided to all without such connotation.

1. In common parlance, a municipal corporation is a city or town. But in legal parlance, such special official agencies as a water district or school district are sometimes considered to be municipal corporations.

4. The extent to which the university served a public function or acted as a surrogate for the state.

5. Whether the university had legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

A developing line of cases has also begun to invoke the concept of "state action" to challenge the legality of state grants of tax exemption to an organization that discriminates on racial grounds in its admission or membership policies. Presumably such a theory could also be applied to discrimination based on sex.

Section 1985(3)

In 1971, the Supreme Court held that Section 1985(3), unlike Section 1983, does not require "state action," at least in cases involving private conspiracies aimed at invidiously discriminatory deprivation of the equal rights secured to all by law. In a further examination of Section 1985(3), the Court said:

> The language requiring intent to deprive of equal protection or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

The conspiracy in the case was motivated by racial bias, and the decision expressly reserved the question of whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under Section 1985(3). In two recent federal cases, however, both involving allegations of employment discrimination by female teachers at institutions of higher education, it was held the section could support an action for sex discrimination.

The current status of Sections 1981, 1983, and 1985(3) can be summarized as follows:

As to Section 1981, the weight of authority seems to be that it will not support an action for sex discrimination.

Section 1983 does support an action for sex discrimination, but a plaintiff must establish that the defendant acted "under color of law," that is, that there was "state action" in the sense contemplated by the Fourteenth Amendment. (Such instances will be noted on occasion in later sections of this study.)

There is confusion among the lower courts as to whether a school district is a "person" within the meaning of Section 1983, but the better and more recent law would seem to be that it is such a person (unless the district, because of state law, is considered a "municipal corporation").

A plaintiff unable to prove "state action" might want to turn to Section 1985(3), since under this section it is not necessary to establish the defendant acted under color of law. But this advantage is offset by the necessity of proving a conspiracy, not always an easy matter. More basic, however, is the fact that the Supreme Court has not yet ruled on whether Section 1985(3) creates a cause of action against sex-based discrimination.

Mr. SMITH of Virginia. Mr. Chairman, this amendment is offered to prevent discrimination against women. Now, I am very serious about this amendment.

Mr. ANDREWS of Alabama. Mr. Chairman, I rise in support of this amendment.

Mr. WATSON of South Carolina. I commend my distinguished leader from Virginia for presenting this splendid amendment.

Mr. GATHINGS of Arkansas. I do not want to discriminate against a job applicant because of her sex and I hope this body will approve the amendment.

Edited selections from debate during Ladies' Day in the House, February 8th, 1964 (110 Cong. Rec. 2577-84).

Among the NAY votes on the amended Civil Rights bill, February 10th, 1964:

Smith
Andrews
Watson
Gathings

110 Cong. Rec. 2804-5.

THE NEW ERA: TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The first federal legislation requiring women to be paid the same as men for equal work was the Equal Pay Act of 1963 (to be discussed in a later section of this study), but the first federal legislation affecting not just pay but all employment rights of women was Title VII of the Civil Rights Act of 1964.

It is an ironic footnote to history, therefore, that this sweeping remedial legislation, in a sense a Magna Carta for women in the field of employment, became law not because it was an idea whose time had come but because of raw accident--specifically, the tactical miscalculations of Southern opponents to the Civil Rights Act as a whole.

Title VII was part of a legislative package promoted by President Johnson in response to the growing political power of the civil rights movement, acting principally on behalf of blacks. The bill had sections variously dealing with the prevention of discrimination in public accomodations, public education, and certain federally assisted programs. Title VII dealt with discrimination in employment.

On Saturday, February 8th, 1964, one business day before the vote on the bill, Congressman Howard E. Smith of Virginia, the octogenerian chairman of the House Rules Committee, rose to offer an amendment including sex as one of Title VII's prohibited forms of discrimination. Insisting he was serious, he entertained his colleagues by reading a letter from a lady who urged that the bill should also correct the present imbalance between males and females, so that every spinster could have a husband of her own. He engaged in banter with Congressman Celler of New York, who, though opposed to the amendment, was moved to offer some ancient doggerel:

Lives there a man with hide so tough
Who says, "Two sexes are not enough."

There was, of course, method in the eleventh-hour tactic. The Southern bloc hoped to split the majority coalition of Democrats and Republicans favoring the bill by getting into it something so unpalatable the cure would seem worse than the disease. As one Southern Congressman after another gallantly urged fair treatment for the fair sex, Congresswoman Green of Oregon, duly noting that the session would probably go down in history as "Women's Afternoon," said resignedly:

> I wish to say first to the gentleman who offered this amendment and to others who by their applause I am sure are giving strong support to it that I, for one, welcome the conversion, because I remember when we were working on the equal pay bill that * * * those gentlemen of the House who are most strong in their support of women's rights this afternoon, probably gave us the most opposition when we considered the bill which would grant equal pay for equal work just a few months ago.

Yet after all the oratory, irony was still the leading player on the stage. The amendment passed, but so did Title VII, and nothing would ever again be the same.[1]

As a Magna Carta, though, Title VII, as finally passed in 1964, was flawed. It created an Equal Employment Opportunity Commission but gave it no significant enforcement powers. More important to women in education, educational institutions were exempted entirely.

Both these flaws were corrected by amendments in 1972, and now most educational institutions (whether private or public) employing 15 or more people are subject to Title VII. Accordingly, many of the earlier Title VII sex discrimination cases involving employment discrimination in a factory or other business enterprise will more often than not be applicable to educational institutions. Similarly, cases involving racial discrimination are frequently applicable to sexual discrimination. As a result, there is a large body of judicial precedent on which to draw in order to measure the impact of Title VII on women in education, though at the same time--because educational institutions so recently came within its purview and because it often takes several years for cases to reach the decision stage and be reported--there is a present scarcity of officially reported cases directly involving educational institutions.

What does Title VII, as it stands today, provide?

In foreshortened substance, it provides it is an unlawful employment practice to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his or her compensation, terms, conditions, or privileges of employment,[2] because of such individual's sex (or race, color, religion, or national origin).

1. It is another ironic footnote to history that this Magna Carta for women in the field of employment uses masculine pronouns throughout.

2. Different standards of compensation, etc., are permissible pursuant to a bona fide seniority or merit system, or one measuring quantity or quality of production, or when employees work in different locations.

It gives the Equal Employment Opportunity Commission, or EEOC, a federal agency, powers to enforce Title VII and aid aggrieved individuals, by court proceedings and otherwise. Furthermore, aggrieved individuals, by filing charges within 180 days after an alleged unlawful employment practice occurs (different rules apply when a complaint was made first to a state agency), and by receiving and acting in timely fashion upon the EEOC's statutory notice of a right to sue, may also undertake court action.

The courts themselves are given broad remedial powers. Under appropriate circumstances, they can enjoin an employer's unlawful practices and also order affirmative relief, such as reinstatement or hiring with or without back pay. Importantly, courts may allow the prevailing party--other than the EEOC or the United States--a reasonable attorney's fee (though in practice such fees seem not to be allowed to prevailing defendants).

One of the defects in Title VII from the standpoint of aggrieved individuals is the time-consuming process inherent in filing a complaint with the EEOC and waiting for the Commission to take action, or waiting for the passage of the time required before the "right to sue" ripens. This is one reason individuals sometimes bring what otherwise might be a Title VII action under the provisions of the post-Civil War Civil Rights Acts discussed in the previous section, for as indicated there, the courts have said that these acts were not preempted by Title VII, and that it was not necessary to exhaust the administrative remedies provided by Title VII before invoking them. It should also be remembered that an otherwise proper Title VII action can be combined with these acts.

The remainder of this section will deal with general principles (derived from court decisions) as they affect the rights of women in education with respect to Title VII's prohibition on sex discrimination in employment. Subsequent sections will deal with specific problem areas, such as hiring, maternity leave, fringe benefits, and so on.

The philosophical heart of Title VII is a prohibition on the application of stereotypes about women as a class to any individual woman. The fact, for example, that an employer believes single women are undesirable in certain jobs because sooner or later they will get married and then move away with their husbands, or that married women are undesirable in certain jobs because they are more likely to get pregnant, will not sustain a refusal to hire a particular woman. She must qualify or fail to qualify on her own merits.

Entry to Title VII--The "Neutral Rule" Concept

It is convenient, for purposes of classification, to speak of discrimination (sexual or otherwise) as "facial" or "facially neutral." The simplest example of facial discrimination based on sex occurs when an employer refuses to hire an applicant simply because the applicant is female. But if this same employer states that anyone who can run the hundred-yard dash in ten seconds will be hired, say, as a bank clerk, this seemingly neutral rule--if one assumes for the moment most men can run the hundred-yard dash faster than most women and that speed in running has nothing to do with the job performance of a bank clerk--results in facially neutral discrimination against women. In practice, of course, neutral rules are not as absurd or patently discriminatory.

In a leading Supreme Court case involving "neutral rules," blacks challenged several of an employer's hiring and transfer practices, one of which required new employees to have a high-school education as well as to pass two aptitude tests in order to be assigned to more desirable departments. The evidence showed that white employees hired before these requirements were put into effect and who had not completed high-school or taken the aptitude tests had continued to perform satisfactorily in those departments. The Court then decided that both these seemingly neutral practices did, in their actual operation, discriminate against blacks and thus violated Title VII. Important general principles were laid down, and they are equally applicable to situations involving sex discrimination. Specifically:

Absence of discriminatory intent does not redeem employment procedures or testing mechanism (such as the aptitude tests above) that operate as built-in hiring or promotion obstacles for the discriminated-against group and are unrelated to measuring job capability. Furthermore, practices neutral on their face, and even neutral in terms of intent, cannot be maintained if they freeze the status quo of prior discriminatory employment practices--unless they can be justified by business necessity.

The concept of business necessity has been defined by the courts as follows:

> (T)he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. (Emphasis supplied.)

In another application of the "neutral rule" concept, a court found unlawful the discharge of a female employee during a company economy drive, because, notwithstanding ten years' service, she had acquired no seniority rights (even though company policy permitted her male counterparts to acquire such rights).

The "neutral rule" concept has a long reach. In one case, a seemingly neutral promotion procedure was invalidated when: (1) the recommendation of an employee's immediate superior was the single most important factor in the promotion process; (2) immediate superiors were given no written instructions concerning the qualifications necessary for promotion; (3) the actual controlling standards were vague and subjective; and (4) there were no safeguards to avert discriminatory practices.

By extension of this same reasoning, an absence of objective criteria in an employer's hiring and promotion practices can, if this absence of criteria has a discriminatory effect, result in a violation of Title VII.

The "neutral rule" concept also brings under judicial scrutiny educational and experience requirements imposed by employers when such requirements have a discriminatory effect and are not demonstrably related to job performance. Most cases involving "educational" requirements, however, have dealt with blacks who have been excluded from certain jobs because they lacked a high-school diploma; the courts have not yet confronted such questions as whether a requirement for a Ph.D. for certain academic positions violates Title VII if the requirement results in discrimination against women who previously could not get into some areas of graduate study because of sex quotas.

The Bona Fide Occupational Qualification Exception

Not all facial sex discrimination in employment is unlawful. One important part of Title VII provides that

it shall not be an unlawful employment practice to hire employees on the basis of sex where "sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

What do those few words within quotation marks really mean?

In the debate in Congress before the passage of Title VII, it was suggested that one example of a bona fide occupational qualification, or BFOQ, might be that of an elderly woman in a nursing home who desired a female, rather than a male, nurse. The EEOC, which by its regulations has said the exception must be narrowly interpreted, postulates "authenticity" as a justification for a BFOQ (such as the need for a male actor to play a male role, or a female actress to play a female role). Obviously, too, occupations such as wet nurse or semen donor, where a physical characteristic unique to one sex is necessary, would meet the BFOQ standards. But actual court cases involve more subtle BFOQ distinctions.

One of these distinctions, the Weeks test, is fundamental and will be considered here. Other, narrower distinctions will be separately treated in a later section.

The Weeks test arose from a situation in which a woman was denied consideration for a particular job in her company because the job sometimes required the lifting of items of equipment weighing in excess of 30 pounds, and her employer felt this factor made it too strenuous for women. The employer therefore argued that the job qualified for a BFOQ exception. But an appellate court, objecting to the argument's implicit stereotyped assumption that few or no women could safely lift 30 pounds, said that in order to invoke the exception, it was not enough to show that most women could not perform the job. Instead, an employer had to show it had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform it.

The Sex-Plus Factor

Two months after the Weeks decision, supra, the same appellate court opened the door to an interpretation of Title VII that many women's rights advocates felt would make the Act largely ineffective.

A woman who had answered an employer's newspaper ad for a particular job was told female applicants with pre-school age children were not being considered. There was no similar restriction on male applicants.

The appellate court decided this practice did not violate Title VII because not all women were excluded from consideration. Rather, it was the combination of being a woman plus the factor of having pre-school age children that resulted in exclusion.

A dissenting judge pointed out that this concept, which he called "sex-plus," would permit employers to discriminate against women in hiring and other employment practices simply by combining sex with almost any other factor--age, height, marital status, and so on--to restrict their job opportunities. The case was simple, he said. A woman with pre-school children could not qualify for the job, a man with pre-school age children could. Therefore the exclusion, no matter how it was masked, was based on sex.

Subsequently, the Supreme Court overturned the majority decision, and as a result the concept of the sex-plus factor is generally considered dead.

Statistics

Statistics are a vital tool for plaintiffs in Title VII actions. A number of courts have said that statistics alone can sometimes establish a prima facie case.[3] In one such case, an untenured female assistant professor who alleged she was about to be discharged because of her sex introduced statistical evidence to show, among other things, that out of 401 faculty members in the school of medicine where she was employed, only five women had tenure, six departments had no women at all, and eleven had no tenured women. As a result, she became the first academic woman to obtain a preliminary injunction under Title VII.

But statistics showing discrimination are not the whole story. For example, a defendant might still prevail by coming forward with evidence showing not that the statistics were incorrect, but that the decision not to promote the plaintiff herself was based entirely on considerations other than sex. On the other hand, an employer cannot refute statistical evidence of discrimination in hiring, for example, by showing that no women ever applied for employment, because the employer's reputation for discrimination might have had a "chilling" effect on inquiries.

Also, statistics have more probative value when the employer has several thousand employees. Thus, one court largely disregarded statistical evidence of discrimination against women because the employer had only ninety employees. And when it has been proven that there is low employment of women by a particular employer and the statistics establishing this fail to establish discrimination in a legal sense, it may be because the plaintiff has failed to show there was a pool of qualified applicants for the job in question.

Back Pay and Other Equitable Relief

The issue of back pay is involved in many Title VII cases, but whether it is in fact awarded to a prevailing plaintiff is discretionary, the courts have said. There is ample authority, for example, to support a refusal to award back pay, even when discrimination is proven, if the employer can show it acted innocently and in good faith.

The award of back pay, in short, is not intended to be punitive. Rather, it is intended to restore the recipient to her rightful economic status absent the effects of the unlawful discrimination, and a court will balance the equities between the parties and decide on a result consistent with fairness and the overall purposes of Title VII.

A court also has broad discretionary power to fashion remedies which prevent future discrimination and correct the effects of past discrimination. If it seems appropriate, a court can even retain jurisdiction of a case for several years to ensure that the particular remedial measures it has mandated will be carried out.

3. In law, a prima facie case is one that suffices to bear out the claim of the party presenting it until contradicted and overcome by other evidence.

Summary

Basic to Title VII is the philosophy that stereotypes about women as a class cannot be applied to women as individuals.

In hiring and similar employment decisions involving blacks and whites, employers are expected to be color-blind. By the same token, in hiring and similar employment decisions involving men and women, employers are expected to be sex-blind.

Employment practices neutral of their face, and even neutral in terms of intent, cannot be maintained if they freeze the status quo of prior discriminatory employment practices--unless they can be justified by business necessity. But the concept of business necessity requires that there be an overriding business purpose such that the practice is necessary to the safe and efficient operation of the business.

Discrimination is also permissible if sex is a bona fide occupational qualification, or BFOQ. But an employer invoking this defense has the burden of showing it has reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would not be able to perform the particular job.

Employers, however, cannot evade the mandates of Title VII by introducing a "sex-plus" factor into their appraisals. For example, they cannot treat a woman with pre-school age children differently than they would treat a man with pre-school age children (unless they can demonstrate the existence of a BFOQ).

Within the mechanics of a Title VII case, statistics can often be a deciding factor in proving sex discrimination. But they are not the whole case and, even if unrebutted, do not overcome evidence establishing that the particular plaintiff was not hired or promoted for totally different reasons.

The award of back pay to a prevailing plaintiff in a Title VII case is not automatic. The courts, as in the other remedies they fashion under Title VII, will try to balance the equities and arrive at a result consistent with fairness.

With all the foregoing as a general introduction to the operation of Title VII, the next sections will examine specific areas of sex discrimination in employment.

> The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as a cage.
>
> From the opinion of Peters, J., in the California Supreme Court case of Sail'er Inn, Inc. v. Kirby

SEX DISCRIMINATION IN EMPLOYMENT--HIRING, PROMOTION, TRANSFER

Hiring, promotion, and transfer are treated together here because in general similar principles are applied to problems in each of these areas.

The first part of this section continues with an examination of the BFOQ exception begun in the previous section, except that here the focus is on specific areas of application, namely, customer or similar preferences, marital status, state protective laws, and physical characteristics or capabilities. At the heart of all of them is the concept, set out in the legislative history and EEOC regulations, and uniformly endorsed by the courts, that the BFOQ exception must be interpreted narrowly.

The second part of this section then considers cases involving hiring, promotion, and transfer, but not necessarily involving the BFOQ concept.

Part I

Customer and Similar Preferences

In a Fifth Circuit case in which the Supreme Court refused review, an airline argued that its policy of excluding men from jobs as flight cabin attendants was justifiable as a BFOQ because the evidence showed females could better attend to the psychological needs of its passengers and because its passengers overwhelmingly preferred to be served by female flight attendants.

The Fifth Circuit rejected both arguments. A single-sex requirement was valid, it said, only when the essence of the business operation would be undermined by not hiring members of one sex exclusively. Customer preferences could be taken into account only when based on the company's inability, otherwise, to perform the primary function or service it offered.

The principle enunciated in the case applies equally to women denied jobs in education because coworkers or students prefer males.[1] The exclusion can be upheld only if the educational institution would otherwise be unable to perform the primary service it offers.

1. There are certain exceptions, such as those imposed by conventional norms of privacy, viz., a male attendant in the boys' locker room, a female attendant in the girls' locker room. But the norm of privacy rather than the preference of the students creates the BFOQ.

State Protective Laws

In the section of this study dealing with the equal protection clause, it was observed that a 1908 Oregon case established a judicial precedent for upholding state protective laws intended to shield women from employment situations considered harmful to their health or else undesirable from the standpoint of a particular cultural bias. These laws take many forms. Sometimes they directly exclude women from specific occupations, such as bartending. Sometimes they indirectly exclude women from certain occupations by limiting the weights they can lift, the hours they can work, or the times of the day during which they can work. Sometimes they limit employment opportunities in more subtle ways by requiring employers to give women special rest areas, lunchrooms, meal periods, or work breaks, the practical result being that some employers, to avoid the expense of complying with such laws, simply refuse to hire any women. And sometimes these laws require that women receive premium pay for overtime when men do not.

When these laws are challenged pursuant to Title VII's prohibitions on sex discrimination, employers have argued, but on the whole not successfully, that the laws themselves create a BFOQ. And when the courts confront state protective legislation which conflicts with Title VII, they face the difficult decision of whether to invalidate the offending law or to extend it so it protects the excluded sex. Another difficult question is, who should bear the cost of the discrimination perpetuated by such laws? Women argue that they have lost money because of the protective legislation, but through no fault of their own, and that therefore they should be reimbursed. Employers, however, argue that they should not have to pay back wages because they were caught, but through no fault of their own, between conflicting federal and state requirements. A number of courts, accordingly, have refused to allow back pay when the employer has been able to demonstrate a good faith reliance on the state law.

Invalidation has been more common than extension, probably because extension, as one court has said, "would constitute usurpation of the legislative power that has been vested exclusively in the state legislature."

Marital Status

In 1971, the Supreme Court refused to review a case in which it was held that an airline stewardess had been wrongfully discharged for violating a company policy requiring that stewardesses remain unmarried. No such policies applied to male flight cabin attendants.

The appellate court had found that the no-marriage rule was not a BFOQ for the position held by stewardesses, and also noted that the airline had been led to impose the rule after receiving complaints from husbands about the irregularity of their wives' working hours. But this justification was insufficient, because Title VII required that there be a correlation between the condition of employment and the satisfactory performance of the employees' occupational duties. The complaints of husbands did not meet this requirement.

By the same token, an educational institution cannot automatically terminate a single woman's employment because she marries (unless, of course, it applies the same rule to single men). But if an employer does have

a no-marriage policy applicable only to women, a person claiming to have been damaged by the policy must show that the policy itself was the cause of the damage. A woman who has just married, for example, cannot resign for her own convenience--such as to move to the city where her husband lives--and then invoke the aid of Title VII.

Physical Characteristics and Capabilities

Aside from restrictions placed by state protective laws on the lifting of objects over a certain weight by women, many employers independently adhere to an equivalent policy, thus excluding women from a wide range of usually better-paying jobs. But employers, too, have been generally unsuccessful in invoking the BFOQ exception to justify such weight-lifting limitations, which are frequently fixed at about 30 pounds--even though women are accustomed to handling this much weight and more when they care for children in infancy.

The defect in such a policy, in terms of Title VII, is that it depends on a stereotype about women as a class. Or, as was said in one case:

> The premise of Title VII * * * is that women are now to be on equal footing with men. * * * The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification.

Notwithstanding the foregoing, however, one court has said in passing that where an employer can demonstrate it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general exclusionary rule.

In a 1973 case, the issue was not the weight the employee could lift, but the weight of the employee herself. It was held the employer violated Title VII by a policy requiring production workers to weigh a minimum of 150 pounds, where the requirement excluded large numbers of women and there was no showing the weight requirement was directly related to job performance. Similarly, height requirements imposed only on females have been held to violate Title VII.

The question of whether an employer can invoke the BFOQ exception to require pregnant female employees to take mandatory maternity leaves at arbitrarily fixed times during pregnancy is considered in a later section of this study, but it is noted here there is authority supporting the right of an employer to exclude pregnant employees from consideration for promotion when the new job can be shown to be strenuous.

Part II

Part II notes ways in which the courts dispose of typical Title VII problems in hiring, promotion, and transfer practices.

A female college student, for example, who brought an action against employers which had allegedly engaged in sex discrimination in hiring when they interviewed at her college, had apparently not actually applied for a

job herself. It was held that this was not necessary if she was deterred from making application and seeking an interview because the defendants had indicated an express preference for hiring males.

In another case, in which a better qualified male was appointed to a managerial position, discrimination was nevertheless found to exist because a female employee applying for the same position had been told that the job "wasn't suitable for a woman."

But the fact discrimination against women in general has been shown to exist in an employer's promotion policies does not necessarily mean an individual plaintiff will prevail. In one such case, evidence of general discrimination against women was overcome by a showing that there was no position open when the particular plaintiff sought advancement, that she was an aggressive employee who antagonized her superiors, and that her employment record did not substantiate her claim she was doing an outstanding job.

In another promotion case, a court objected, under the "neutral rule" concept, to an employer's nonvalidated procedures for promotion to management-level jobs which gave special weight to technical degrees, military experience, and prior supervisory experience (when teaching, which one of the plaintiffs had done, was not considered "supervisory" experience).

By the same token, any haphazard promotion system is now suspect. On the other hand, if an employer can demonstrate it weighed each person's talents in good faith and then chose the man over the woman (or the woman over the man), no case is made under Title VII.

Summary

In general, women in education cannot be denied a particular job because students or coworkers (or similar groups) prefer the job to be filled by a man. Such preferences do not create a BFOQ, because the language of Title VII permitting a BFOQ exception when "reasonably necessary to the normal operation" of an employer's business requires a business necessity test, not a business convenience test.

Women in education cannot be denied access to a particular job because the educational institution would otherwise be in violation of a state protective law. Thus, they cannot be denied the right to teach night-school courses because state law prohibits women from working after a certain time in the evening. Nor can they be denied jobs which require more work per day or per week than is permitted by such laws. Similarly, female custodial workers in educational institutions cannot be excluded from better-paying male custodial positions simply because of legislative restrictions on physical exertion by women.

Such protective legislation does not generally justify a BFOQ exception, and to the extent, but only to the extent, it conflicts with Title VII, courts will declare it invalid or else extend it to the excluded sex.

Marital status alone does not justify a BFOQ exception, and an educational institution which treats female employees who marry or are married differently from male employees who marry or are married is in violation of Title VII.

Policies of educational institutions excluding women from a particular job because of stereotyped assumptions about the physical ability of women in general to handle the demands of the job do not qualify for a BFOQ exception.

Nor can such an institution's policy requiring females to meet certain height, weight, and similar arbitrary physical standards so qualify (when the same policy does not extend to males and business necessity is not involved).

In other general aspects of hiring, promotion, and transfer practices, it has been held that a woman charging an employer with sex discrimination in hiring does not necessarily have to show she actually applied for employment and was rejected in order to have standing to sue. Her complaint may be sufficient if she alleges in the alternative that she was deterred from making application because the employer had indicated an express preference for males.

Nonvalidated procedures used by educational institutions for promotion to management-level jobs which have the effect of favoring males over females, such as the giving of special weight to military service, are objectionable.

Even where an educational institution promotes a better qualified male in preference to a female, actionable discrimination may still exist if the employer refused to consider the female for the position because of her sex.

SEX DISCRIMINATION IN EMPLOYMENT--RECRUITING

The message of Title VII is clear: "old-boy" recruiting networks (when they result in discrimination against women) are out.

In one appellate case, involving a challenge by blacks to an employer's practices of word-of-mouth recruiting, and of recruiting for skilled personnel only at all-white institutions, it was said:

> Under word-of-mouth hiring practices, friends of current employees admittedly received the first word about job openings. Since most current employees are white, word-of-mouth hiring alone would tend to isolate blacks from the "web of information" which flows around opportunities at the company. * * *
>
> * * * Word-of-mouth hiring and interviewing for recruitment only at particular scholastic institutions are practices that are neutral on their face. However, under the facts of the instant case, each operates as a "built-in headwind" * * * and neither is justified by business necessity.

The case was sent back to a lower court with instructions to devise an affirmative-action recruiting plan for the employer, and to keep it from restricting its recruitment to all-white (or predominantly all-white) campuses while maintaining such a racially imbalanced work force.

Everything said above can reasonably be applied to the recruitment of women in education. The courts, however, do not order educational institutions to recruit in special ways when discrimination has not been shown. As one court has said:

> Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discriminatory. * * * However, absent such a showing, word-of-mouth recruiting will not be barred. (Emphasis supplied.)

On occasion, job-recruiting brochures which are replete with feminine pronouns or that carry slogans such as "Fit for a Queen" can help establish discrimination if brochures for other jobs in the same institution are similarly male-oriented.

In another aspect of recruitment, women graduates of a law school charged that the school allowed employers which engaged in discrimination against women to use its facilities to recruit law students. They contended the school was operating an "employment agency," and that as such, it was violating Title VII.[1] The court, though agreeing that the law school was operating an employment agency, said the school did not have to make a determination as to whether particular firms were engaging in discrimination, nor did it have to prohibit them from recruiting, since it had performed its duty once it referred all prospective employees, including women. (Additionally, the school required each firm to interview all students who indicated interest.)

The question has also arisen as to whether newspapers which publish sex-designated help-wanted ads are "employment agencies" in the sense of Title VII. Without exception, the federal courts have said they are not, and thus there is no violation of Title VII if they segregate such columns. But one court was moved to give the newspaper defendant some informal judicial advice:

1. Title VII also prohibits discrimination by employment agencies.

> It seems appropriate to suggest, * * * however gratuitously, that the position of the plaintiffs is an idea whose time has come and that serious consideration be given to a revision of the classification practices in employment advertising without reference to and free from the compulsion or jurisdiction of the court.

In a Supreme Court case not involving Title VII, consideration was given to a Pittsburgh ordinance which prohibited any employer from publishing sex-designated want ads. Another part of the ordinance prohibited anyone else from helping in the doing of acts made unlawful by the ordinance. A newspaper charged with having violated this latter section by accepting such sex-designated want ads contended that the ordinance breached its First Amendment rights. But the Court held that the advertisements were classic examples of so-called "commercial speech," and as such, not protected by the First Amendment.

In another type of want ad issue, a male job-seeker read a newspaper ad for stewardesses placed by an airline in the "Help Wanted--Females" column. There was no corresponding advertisement for cabin stewards in the "Help Wanted--Male" column, and he brought suit under Title VII without ever having applied to the airline for a job.

The airline, accordingly, argued that since he had never applied for employment, he had not been injured and therefore had no standing to sue. To this argument, an appellate court replied:

> But this position requires too much. The very appearance at an employer's offices of one who had read the discriminatory ad but nevertheless continued to seek a job, would demonstrate that the reader was not deterred by this unlawful practice and therefore not aggrieved. Thus, if we were to hold that Hailes cannot challenge this advertisement, then nobody could ever complain of this practice which Congress has so directly proscribed. However, we refuse to rule that a mere casual reader of an advertisement that violates this Section may bring suit. * * * To be aggrieved under this subsection a person must be able to demonstrate that he has a real, present interest in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such employment. (Emphasis supplied.)

SEX DISCRIMINATION IN EMPLOYMENT--DISCHARGE

This delicate area of employer-employee relations, often charged with bitterness and unspoken grievances on both sides, can lead to complicated Title VII fact situations in which the influence of discrimination, if any, in the actual discharge is difficult to isolate in the sense of leading to abiding legal principles. Most discharge controversies, in short, are decided on a case-by-case basis (unless the alleged sex discrimination in the discharge falls within general Title VII principles discussed in previous sections).

An exhaustive study of the varying situations in which discharge is held to be or not to be in violation of Title VII's prohibition on sex discrimination is outside the scope of this study, but Appendix D-2 notes a few instances in which the conduct of the employee herself negated the charge of discrimination, and one instance in which the discharge, though seemingly justified, led to a violation of Title VII because of the employer's retaliatory conduct after the employee filed a complaint with the EEOC. A later section of this study concerned with sex discrimination in educational employment notes additional discharge cases.

> What she (the plaintiff) should do is to work for the repeal of the biological law of nature. She should get it amended so that men shared equally with women in bearing children. If she could prevail upon the Great Creator to so order things, she would be guilty of violating the equal protection of the law unless she saw to it that man could also share in the thrill and glory of Motherhood.
>
> * * * In the matter of pregnancy there is no way to find equality between men and women. The Great Creator so ordained the difference, and there are few women who would wish to change the situation.
>
> From the opinion of Ellett, J., in the 1975 Utah Supreme Court case of Turner v. Dept. of Employment Security

SEX DISCRIMINATION IN EMPLOYMENT--MATERNITY AND PREGNANCY POLICIES

In general, two main types of cases arise in connection with sex discrimination charges related to maternity or pregnancy in employment. In the first, the employee challenges mandatory leave policies imposed at a fixed time during pregnancy, or mandatory recovery and return periods after the birth of the child. The leave policies so challenged usually mean no pay during the period of absence from work and sometimes entail a risk the individual will not recover her job.

In the second type, the employee challenges the refusal of the employer (or a disability plan) to extend the same benefits for temporary absence caused by pregnancy as it does for absence due to temporary disabilities generally.

The two types of cases (which sometimes involve equal protection concepts rather than Title VII) will be considered in order below.

Mandatory Maternity or Pregnancy Leaves

In most of the decided cases, the women plaintiffs have introduced medical evidence to support the argument they were not physically disabled from performing their duties on the job, while the employers have usually responded with evidence to the effect that pregnant women in general required assistance, or that the particular mandatory rule eliminated the administrative problems involved in making individual determinations of disability.

In a large number of these cases, the plaintiffs have been teachers, but because Title VII did not include educational institutions until 1972, the earlier teacher cases were usually brought under the equal protection clause. What follows immediately below, however, is a synthesis of court decisions both before and after the effective date of the 1972 amendment (but prior to an important 1974 Supreme Court decision which is discussed subsequently):

> School board policies flatly requiring every pregnant teacher to take a mandatory leave after the fourth through seventh month of pregnancy deny equal protection.
>
> School board policies granting maternity leave to tenured teachers but not to untenured teachers deny equal protection.

> School board policies requiring the dismissal of pregnant teachers at the end of a certain month of pregnancy penalize them for being women, and it is immaterial whether the pregnancy was voluntary. The state must demonstrate a compelling interest to justify such policies because the interest involved is a fundamental one in that (1) it concerns the acknowledged right of women to bear children and (2) it demands that teachers select either employment or pregnancy.
>
> Since no two pregnancies are alike, the decision as to when a pregnant teacher should discontinue working is a matter best left up to the woman and her doctor.
>
> While it is true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by teachers, to say this is true of all women is to define that half of the population in stereotypical terms. Any rule that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual woman involved.
>
> Though continuity of instruction is an important value, where a pregnant teacher provides the school board with a date certain for commencement of leave, that value is preserved.
>
> The fact a pregnant teacher may cause classroom distractions because embarrassed children giggle, laugh, and make snide remarks does not justify a mandatory leave policy. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word.

In 1974, the issue of mandatory maternity leaves for teachers reached the Supreme Court in Cleveland Board of Education v. LaFleur. Two circuit court cases, both of which had been decided on equal protection grounds, were under review. In the first case, a pregnant teacher had to take unpaid leave five months before the expected childbirth, with the application for such leave to be made at least two weeks before her departure, and she could not return to work until the first next regular semester after her child was three months old. In the second case, the teacher had to leave work at least four months, and to give notice at least six months, before the anticipated childbirth. Re-employment was guaranteed no later than the first day of the school year after the date the teacher was declared re-eligible. In both cases a physician's certificate of physical fitness was required prior to the teacher's return.

The Supreme Court reached the following conclusions:

1. Both advance notice provisions were wholly rational and perhaps even necessary to serve the objective of continuity of education. A school board, in short, has the right to demand "substantial advance notice" of pregnancy.

2. The absolute requirements of termination at the end of the fourth or fifth month of pregnancy violated due process (equal protection was not discussed) because they created a conclusive presumption that every pregnant teacher was physically incapable of teaching after these months had been reached.

3. Nevertheless, a school board probably may have a blanket rule requiring termination of employment at some firm date during the last few weeks of pregnancy if the rule is supported by medical evidence showing that pregnancy in these latter days has a disabling effect on performance, or by non-medical evidence showing, for example, that substitutes could not be procured without some minimal lead time.

4. The return rule that a mother had to wait until her child reached the age of three months before the rule began to operate was arbitrary and irrational. But the return rule guaranteeing re-employment no later than the first day of the school year after the date the teacher was declared re-eligible (which also required a physician's certificate of her physical fitness) was proper.

LaFleur, therefore, does not abolish all mandatory school board maternity leave policies. School boards (and other employers) may still establish policies that do not arbitrarily infringe upon each individual woman's teaching capabilities. But mandatory termination and return dates must be justified by sufficient evidence.

Exactly this kind of accommodation took place in a subsequent California case, where a district court upheld a rule requiring a pregnant teacher to take a leave at the end of eight months of pregnancy. The school district, following the suggestions in LaFleur, had presented medical evidence relating to the declining ability of pregnant women that late in term to perform effectively, as well as evidence relating to miscalculations by doctors as to the predicted date of delivery.

In another case decided after LaFleur, it was held to be proper to require a teacher to submit a resignation upon learning she was pregnant when the resignation was used as a notification device to promote continuity of instruction by allowing school officials to plan for the coming semester, and when the teacher was also allowed to continue teaching as long as she was able. But to avoid a violation of due process, it was incumbent upon the school officials to give such a teacher a priority right to return to teaching when the first available position in her field became vacant.

LaFleur was also applied in a 1975 Virginia case, with respect to a school district's policy of requiring a teacher who became pregnant prior to reporting for duty at the beginning of the school year to obtain a release from her contract. Back pay was allowed to a teacher dismissed because of the policy.

Exclusion of Pregnancy-Related Disabilities from Disability-Benefits Coverage

This is the other major area of controversy relative to employers' maternity policies, and the weight of judicial authority, under both Title VII and equal protection doctrines, supports the principle that where an employer makes payments to employees for temporary disabilities, either directly or through a private insurance program, it must treat pregnancy (whether or not abnormal) as a temporary disability and make payments to an employee absent from work because of pregnancy on the same basis as payments are made for other temporary disabilities.

The fact pregnancy may be a voluntary condition, whereas many temporary disabilities are not, does not diminish the principle. Nor is the increased cost of such coverage a valid objection.

However, in 1974 the Supreme Court upheld one type of limitation on disability payments for pregnancy. It said there was no violation of the equal protection clause if a state-operated disability insurance program funded entirely by contributions deducted from the wages of participating employees excluded from coverage any work loss resulting from normal pregnancy.

This same case is additionally important because a frequently discussed footnote to the opinion takes the position that the exclusion of pregnant women from the disability insurance program's coverage was not an exclusion based on sex, thus raising a question as to what the Court will do when it eventually confronts a Title VII case involving disability payments for pregnancy. A number of lower courts have taken the position that the footnote does not affect earlier Title VII decisions requiring employers to treat pregnancy as they do any other temporary disability, but there is nevertheless uncertainty because of the footnote, and the issue is believed to be on its way to the Supreme Court.

Miscellaneous

Title VII was held to be violated when an employer discharged an unmarried pregnant office worker who was approximately five and a half months pregnant. The evidence showed that her pregnancy alone did not interfere with her job performance and it was therefore concluded she had been discharged because she was unmarried.

In a similar case, it was held that a school district's policy of refusing to employ unwed parents as teacher's aides denied equal protection and due process. Unwed parenthood, it was said, was not necessarily evidence of present immorality, and there were reasonable alternative means by which to remove or suspend teachers engaged in immoral conduct.

In another similar case, it was held that a board of education violated the constitutional right of privacy of a tenured, unmarried pregnant teacher when it cancelled her employment pursuant to a state statute authorizing such action for immorality, where (1) the evidence upon which the board acted had its source in disclosures a board official solicited from the teacher's physician regarding her pregnancy, (2) the evidence failed to show the teacher consented to the physician's disclosure of her private communications with him, and (3) the board made no finding the teacher's claimed immorality had affected her competency as a teacher.

But in another recent case, an unmarried teacher who was transferred from her classroom teaching position after she notified her superiors of her pregnancy was denied injunctive relief. It was said the teaching termination was justified by legitimate educational concerns because the class she taught, composed of special education students, particularly needed a learning environment free of the disruption and tension likely to be engendered by any public controversy which might arise. And there was no sex discrimination, it was said, because there was no evidence males were treated differently.

In an entirely different context relative to maternity policies, it has been held that a husband and father teaching at a city college has standing to sue on equal protection grounds when the college refuses to extend to him the same child-care leave privileges it extends to women teachers.

Summary

The courts have made clear that mandatory leaves imposed by employers on pregnant employees at arbitrary times during pregnancy will no longer be tolerated. Stereotypes about the capability of pregnant women to work at their jobs are objectionable, as are stereotypes about the amount of time a woman must remain away from her job after childbirth.

On the other hand, the Supreme Court has indicated that employers might be able to make blanket regulations requiring mandatory leaves at some firm date during the last few weeks of pregnancy, provided they establish the reasonableness of such regulations by medical and other appropriate evidence.

Employers are also entitled to make reasonable rules concerning the time of return to work by the employee after childbirth. In LaFleur, the Supreme Court found reasonable a rule that a teacher would become eligible for re-employment upon submission of a medical certificate from her physician, with return to work being guaranteed no later than the beginning of the next school year following the eligibility determination. At the same

time, it found it unreasonable to require the mother to wait until her child reached the age of three months before the return rules began to operate.

Many courts have held, with respect to Title VII and the EEOC guidelines concerning pregnancy, that the female employee who leaves work temporarily because of pregnancy must receive the same benefits as are accorded other employees who are absent from work because of temporary disabilities.

The Supreme Court, however, has not considered whether Title VII, as the EEOC guidelines maintain, requires such treatment. In a 1974 case, though, it said that a state disability insurance program which excluded normal pregnancy from coverage was not an unconstitutional classification as far as equal protection was concerned. The decision, and one of its footnotes, creates uncertainty as to exactly how the Court will eventually deal with this aspect of Title VII.

SEX DISCRIMINATION IN EMPLOYMENT--FRINGE BENEFITS

Title VII, as noted earlier, provides that it is an unlawful employment practice to discriminate with respect to "compensation, terms, conditions, or privileges of employment" because of sex.

The cases in the previous section dealing with employers' maternity and pregnancy policies constitute one broad example of Title VII's protection in areas of educational employment other than compensation per se. Other fringe benefits of educational employment are similarly protected.

One of these important coverages is, of course, pension benefits. But the concept of "pension benefits" involves at least four subconcepts:

1. The equality of actual periodic payments received by male and female pensioners.
2. The equality of monthly contributions made to the pension plan by male and female employees.
3. The equality of monthly contributions made to the pension plan on behalf of male and female employees by the employer.
4. The length of service necessary to qualify for a pension (as between men and women) or the age at which an employee may (or must) retire (as between men and women).

The courts have agreed that length of service or the age at which an employee may (or must) retire cannot be different as between men and women employees, and by implication they seem to have said that periodic payments received by male and female pensioners should, in most cases, be the same. There is also authority to indicate monthly employee contributions should not be different as between the two sexes, even where actuarial tables show that women as a class live longer than men and are thus more likely to receive retirement benefits for a longer period.

Pension benefits aside, seniority itself is also a fringe benefit of employment,[1] and if extended to males, must be extended to females in an equivalent employment situation. Thus, an employer which lays off female employees while retaining males with less seniority violates Title VII if the discrimination is based on sex.

Free living quarters provided in a university building for a male employee but not provided for his female counterpart can lead to a violation of Title VII. Other factors, however, such as additional duties, may justify the practice.

Similarly, women employees of educational institutions who travel on the institution's business are entitled to the same kind of hotel accomodations and transportation perquisites as their male counterparts.

There is even authority suggesting that if an employer holds a special recreational event for male employees (in the actual case, a golf tournament and stag), it must offer something approximately similar for female employees (in the actual case, a style show and luncheon).[2]

1. Seniority--particularly in unionized environments--has two aspects. One is plant- or institution-wide seniority, the other is department seniority. Plant-wide seniority is accumulated from the moment of employment and usually determines vacations, retirement and severance pay, layoffs, and recalls. Department seniority, where it exists, accrues only from the time an employee begins to work in a particular department and determines the line of upward progression there. When an employee transfers to another department, she must begin anew to accumulate departmental seniority.
2. The judge in the case may not have realized he was indirectly endorsing another stereotype about women. Perhaps the ladies would have preferred their own golf tournament and stag.

SEX DISCRIMINATION IN EMPLOYMENT--LAYOFFS PURSUANT TO A SENIORITY SYSTEM

In light of the recent economic climate, the problem of how to reconcile layoffs due to business conditions with the federally imposed requirements of nondiscrimination in employment has acquired increasing importance. In many institutions, traditionally, a "last hired, first fired" policy is in effect, either formally or informally, and if the particular employer has been unionized, the policy is most likely part of a collective bargaining agreement. In any event, if such seniority procedures operate, members of the discriminated-against group last hired are going to be predominant in the group first fired. Does seniority, therefore, defeat the intent of Title VII? The answer to that question is complicated by the fact that Title VII itself provides that it shall not be unlawful for an employer to apply different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate.

The cases that have considered the problem have generally involved minorities rather than women, and unionized rather than nonunion environments, but the principles drawn from them would apply, if there were a bona fide seniority system within the meaning of Title VII, to women employed in those segments of a particular educational institution not actually unionized.

The first Title VII case in this area arose in Louisiana in early 1974. Pursuant to a union contract, the last man hired was always the first to be laid off, and laid off employees were placed on a recall list and re-employed, as needed, in the reverse order of the layoffs--i.e., the most senior employee on recall would be the first to be re-employed. As a result, all blacks hired since 1965 had been laid off, and the first 138 persons on the recall list were white.

Under these facts, the trial court directed the employer to recall--without laying off any incumbent employees--enough blacks to restore the racial percentage of the work force that existed as of the date the last new employee was hired. And if future layoffs had to be made, they were to be allocated so that the ratio of blacks to whites would remain unchanged.

A few months later, the first case involving women arose. Female police officers in Cleveland obtained a temporary restraining order against the city, which was planning two days later to lay off 89 officers, 13 of whom would be women, because of financial problems. This would mean that while 87 percent of the women hired in 1973 would be laid off, only 42 percent of the men hired that year would be laid off--even though women constituted only 8 percent of those hired in 1973 and only 1.9 percent of the total police force. In view of the disparate effect on women and the likelihood the plaintiffs would be able to show a history of discrimination against female applicants, the district court ordered that those laid off be not more than 8 percent female.

But in the first appellate decision on the issue of discrimination in layoffs based on seniority, the Seventh Circuit reached a result opposite from the two previous cases and upheld a "last hired, first fired" seniority system. Title VII, it was said, mandated that workers of every race be treated equally according to their earned seniority, but it did not require that a worker be granted fictional seniority or special privileges because of his race:

> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. (Emphasis supplied.)

Sex discrimination in layoffs was the issue in a 1975 Third Circuit case, where a similar "last hired, first fired" policy was upheld, and where it was said that Congress, in passing Title VII, had not intended that an automatic violation of the Act would occur whenever females were disadvantaged by reverse seniority layoffs.

To summarize, the Third and Seventh Circuits have said, in effect, that Title VII permits an employer to lay off employees pursuant to a plant-wide "last hired, first fired" bona fide seniority system even if such a system perpetuates past sex-discriminatory practices. The Fifth Circuit is about to rule on the same issue, and undoubtedly it will proceed in due course to the Supreme Court.

Even given the Holdings of the Third and Seventh Circuits, there is at present no case law on whether an informal or unwritten but consistently followed "last hired, first fired" seniority system (as opposed to one formalized by an employer-union contract or incorporated in Civil Service or similar regulations) would qualify as bona fide for purposes of excepting layoffs from sex discrimination charges pursuant to Title VII.

SEX DISCRIMINATION IN EMPLOYMENT--NEPOTISM

It is not uncommon for educational institutions to have rules prohibiting a husband and wife (or similarly closely related persons) from working in the same department, or sometimes even in the same institution, but no Title VII education cases in this area have as yet been officially reported since such institutions were made subject to Title VII in 1972.

In an earlier case, in which a female biology teacher at a public junior college challenged on constitutional grounds the action of the college in not rehiring her because of just such a departmental policy, and in which the appropriateness of the policy itself was not in issue, the rationale of such policies was said to be that of discouraging nepotism and favoritism, avoiding the emergence of disciplinary problems, inhibiting personal and professional cliques in which the husband and wife would side with each other, and preventing one spouse's frequently taking the teaching assignment of the other.

In one noneducational Title VII case in this area, a woman challenged an airline's policy which prohibited a husband and wife from working in the same department. She had been told that, following her marriage, either she or her husband (who worked in the same department) would have to decide which of them would transfer, take a leave, or resign. Neither made an election, and she was terminated.

The particular department operated around the clock, and employees were always concerned with what shift they might be assigned. The trial court concluded that if a husband and wife were employed in the same department, they would naturally attempt to arrange similar working schedules and, if they were unable to do so, this might have an adverse effect upon their performance or cause inconvenience to the company in trying to accomodate them. Thus the policy had a legitimate business purpose and there was therefore no sex discrimination in violation of Title VII.

In a state court case brought under a state Human Rights Law, a different result was reached under substantially different facts. The plaintiff and her husband were speech professors at a state university with a similar nepotism rule. As a result of this rule, the plaintiff had been denied "term" appointments and been forced to take "temporary" assignments since her marriage. Because of these temporary appointments, she had been denied fringe benefits and tenure rights, and when she subsequently applied for maternity leave (a benefit accorded to "term" appointees), her services were terminated.

The rule was struck down because in none of 27 nepotism cases at the university had a husband been required to accept a "temporary" appointment, and because the rule had sometimes been waived when the university sought to attract a "star" professor whose wife also wanted to work. Under these facts, it was held the rule discriminated against women.

But because of the dearth of authorities in the Title VII area, it is not presently possible to make a judgment as to whether women in education can successfully challenge similar nepotism rules (although if a plaintiff produced evidence similar to that produced in the state court case above, and if there was no showing by the defendant of a legitimate business purpose similar to that shown in the airline case above, such a challenge might prevail).

SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT

While the judicial principles and decisions discussed in previous sections all affect the employment rights of women in education, and many of the cases which are the source for these principles have arisen in an educational environment, this section deals exclusively with cases involving educational hiring, promotion, and termination. It will also be seen that most of these cases involve equal protection theories rather than Title VII because, as was noted earlier, women in education did not acquire the right to invoke Title VII until 1972, and the decision and reporting process lags far behind the actual commencement of lawsuits.

With certain exceptions, the courts have historically tried to avoid investigating the correctness of legislative findings of fact (with respect, most often, to the need for a particular enactment). The legislature is one branch of government, the judiciary another, and each, so the theory goes, keeps its fingers out of the other's business. This is mentioned here, because a similar theory (though based on a different rationale) operates in the field of education. Courts, in short, are reluctant to interfere with decisions made by educational bodies in the proper exercise of their professional functions.

An example of this reluctance is apparent in the following case, brought under Sections 1981 and 1983 of the post-Civil War Civil Rights Acts by a female who failed to get a job with a university as a music teacher. She claimed that this failure was a result of sex discrimination, but after the university had produced evidence that the refusal to hire her was based on personality clashes, the district court said:

> It is not a court's prerogative to interject itself into the educational institution and to require such institution to either hire or not hire a professor. While such an institution cannot be permitted to refuse employment on unlawful and impermissible grounds, its exercise of discretion in refusing to hire an applicant because it is felt that such person could not harmoniously perform his or her duties should not be disturbed by a court in an action of this character.

In a similar decision by a lower state court, an order of a state Human Relations Commission directing the full-time employment of a female assistant professor of English was overturned. Though concededly she had been told many times she would have to get a doctorate to qualify for full-time employment, she contended the requirement was a sham intended to hide sex discrimination. The court took the position that while reasonable minds might differ as to whether the English Department should have such a requirement, particularly when other departments did not, the establishment of such a policy was nevertheless the prerogative of the administrative officers of the college.

A case in the area of promotion, brought under Section 1983, echoes this same reluctance. The plaintiff was an associate professor who had been teaching almost twenty-five years at the same university and had been requesting appointment to full professor since 1962. Though she produced evidence of a pattern of discrimination against women by her employer, the university demonstrated through testimony that the decision not to promote her was based solely on her record. The trial court explained its dismissal of her complaint in these words:

> The criteria for promotion to full professor are especially exacting * * *. The Court finds that these criteria are reasonable * * * and that they were reasonably applied in this case. * * * It is indisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.

In another promotion case brought under Section 1983 by a female assistant professor at the University of Pittsburgh, the question was raised as to whether there was sufficient "state involvement" in the private university's affairs to permit the bringing of this type of action (see the discussion of the post-Civil War Civil Rights Acts in the first section of this study).

It appeared that, pursuant to a Pennsylvania statute, there were state-appointed trustees on the university's governing board, the state contributed approximately one-third of its budget, and its bonds were exempt from state taxation. Although the district court felt these factors did not establish the degree of state involvement necessary to invoke Section 1983, an appellate court had sufficient doubts to send the case back to the district court for the taking of additional evidence on how the trustees functioned, what their tenure was, and how they were paid for their services. The appellate court was also troubled by a provision in the same statute which provided that the university was to be an "instrumentality" of the state in its system of higher education. This, the court said, seemed to suggest pronounced state involvement in the university's affairs.

The question of "state involvement" was also one of the issues in a Section 1983 case brought against the University of Pennsylvania, a state-aided institution, by a female assistant professor who alleged she had been denied promotion and tenure because of her sex. Here the district court enumerated five factors appropriate to a determination of whether a university was in fact acting under "color of state law":

1. The degree to which it was dependent on state aid.
2. The extent and intrusiveness of the state regulatory scheme.
3. Whether the scheme connoted state approval of the activity or whether the assistance was merely provided to all without such connotation.
4. The extent to which the university served a public function or acted as a surrogate for the state.
5. Whether the university had legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

After applying these factors to the particular situation existing at the University of Pennsylvania, the court found the necessary degree of "state involvement" to invoke Section 1983.

Another issue in the case was whether the plaintiff could invoke the aid of Title VII, since the alleged acts of discrimination had taken place prior to the 1972 inclusion of educational institutions. It was held she could, because the alleged acts, as well as her employment, had continued past the effective date of inclusion, and Title VII was intended to reach continuing effects of past discrimination as well as present discrimination.

What kind of evidence does it take to rebut a charge of discrimination in employment termination (or hiring or promotion)? The evidence varies, naturally, but in the Title VII case of a dean of women who alleged she had been terminated because of sexual bias, the allegation was rebutted by evidence of her absenteeism, tardiness, inability to deal with needs of students, and lack of the educational requirements needed in a reorganized student personnel office.

In another Title VII case, it was held that a college had not acted unlawfully when it refused to renew the contract of a black counselor who had participated in illegal and disruptive occupations of the college president's office and who had refused to discuss standards of conduct appropriate to college employees.

In a Title VII (and Section 1983) case in which a female college teacher sought a court order to prevent her apparently imminent termination, which she alleged was the result of sex discrimination, the request was denied essentially because she was entitled to an administrative hearing and review by college officials before the actual termination could become effective. In short, she had not exhausted her administrative remedies.

On the other hand, a woman who had been an assistant professor without tenure in a medical school for approximately five years successfully sought a court order preventing her otherwise imminent termination until her entire Title VII action had been decided on the merits. However, she produced a mass of statistical evidence showing historic employment discrimination in the medical school between men and women, as well as evidence of damage to her professional reputation and impairment of her ability to get a job.

The complexity of this type of problem is illustrated by a somewhat similar Title VII case arising in New York, where a female Ph.D. in anatomy failed in an effort to obtain a court order to prevent a university medical center from allegedly demoting and then terminating her because of budgetary problems. Even though the plaintiff raised the issue of sex discrimination by showing that the medical center, notwithstanding the budgetary problems, had hired other professors who were male, the evidence lacked impact because she had failed to show a professional comparison between these professors (and their experience and skills and the purposes for which they had been hired) and herself.

In concluding this section on educational employment, it is also to be noted that:

1. Several cases at the university level have held (consistent with most other cases on the subject) that an action for sex discrimination in employment cannot be brought under Section 1981.

2. Two recent cases at the university level have held that an action for sex discrimination in employment, based on conspiracy, can be brought under Section 1985(3). One recent case at the same level, but involving racial discrimination, seemingly rejects the legal possibility of a conspiracy between a university and its administrative officers acting officially on its behalf.

3. In the related area of recruiting at this level, it has been held that only upon a showing of unlawful past discrimination will formal open recruiting or some other recruiting method be mandated by a court in lieu of word-of-mouth recruiting.

SEX DISCRIMINATION IN EDUCATION

Previous sections of this study have been concerned with federal court decisions affecting equal employment rights of women in education. This section concerns itself with federal court decisions affecting other rights to equality of women in education.

Admissions

In early 1970, female students managed to gain admission to the all-male University of Virginia at Charlottesville. How did they do it?

They did it by convincing a federal court the education offered at Charlottesville was of higher quality--and also had a unique "prestige" factor--than that offered at other state-supported institutions. All this, the argument went, denied equal educational opportunities to women and thus offended the equal protection clause

Later that same year, men tried and failed to gain admission to an all-female state-supported South Carolina college. Here, though, there was no evidence to suggest there was any special feature which would have made the college more advantageous educationally to the male plaintiffs.

Recently Congressmen Edwards and Waldie of California brought actions to have women admitted to the Air Force and Naval Academies. A district court said the refusal to admit females did not deny equal protection, in that the policy was reasonably related to a legitimate governmental interest in preparing young men to assume leadership roles in combat, but an appellate court sent the case back to the district court for a further investigation of all the issues surrounding the main challenge.

Another kind of admissions problem arose in Boston several years ago. The plaintiffs were a group of girl students who took an examination for admission as seventh-grade students to the prestigious Girls Latin School the next fall. Even though boys who scored 120 or better out of a possible 200 points on the examination were admitted to Boys Latin that fall, girls who scored between 120 and 133 were not admitted to Girls Latin.

The differential admission standards seemingly arose because the Boys Latin building had a seating capacity for 3,000 students and the Girls Latin building had a seating capacity for 1,500 students.[1] Because of the disparity in seating capacity, school officials, in evaluating the results of the examination, first determined how many seats would be available in the Boys building. They then counted down from the top possible score until they had accepted a number of boys equal to the number of available seats, which thus established the cutoff of 120. A similar technique with reference to the number of seats available in Girls Latin resulted in the cutoff of 133.

Notwithstanding the lack of overt discriminatory intent, it was held that the use of separate standards to evaluate the examination results violated the equal protection clause.

1. Apparently no one challenged the disparity between 3,000 opportunities for boys and only 1,500 opportunities for girls to attend these prestigious, college-oriented schools.

A similar problem (though it arose not from seating capacities of two buildings but rather from a school-district policy) was considered in a case involving San Francisco public schools. Girl students challenged an admissions policy to a special college-preparatory public high school, which required girls to have a higher academic average than boys. The requirement had been imposed because girls of this particular age performed better than boys academically and the school district wanted an approximate balance between the sexes in the special school. The court said, however, that since the district had offered no evidence to show that a balance of the sexes furthered the goal of a better academic education, the policy offended the equal protection clause.

Athletics

Cases alleging sex discrimination in athletics seem to fall into two categories--those in which girls desire to play in interscholastic athletic competition on boys' high school teams, and those in which younger girls desire to play on boys' Little League baseball teams. The categories will be considered in order.

It appears that all the fifty states have some kind of an organization (whose members are high schools or school districts operating high schools) which establishes rules governing interscholastic athletic competition among high schools in the state. Until the recent past, many, if not all, of these organizations had rules providing that females and males could not compete on the same team. This had two discriminatory effects: one, it kept girls out of interscholastic competition in many sports; two, it meant girls could not play certain sports even in their own high school.

Beginning in the early nineteen-seventies, individual girls, each of whom happened to be exceptional in her sport of interest, began to challenge, at about the same time, the sex-restrictive rules of these various interscholastic athletic associations. These challenges, brought on equal protection grounds, have involved golf, tennis, cross-country, cross-country skiing, swimming, and gymnastics, and in most cases they have been successful. In two situations where they were not, the courts were influenced by the fact that the respective defendants had changed their practices so as to provide a separate competitive sports program for girls.

Because these challenges usually involve Section 1983 of the post-Civil War Civil Rights Acts discussed earlier, the courts first have had to determine whether the defendants, usually high schools and the state interscholastic athletic association, (1) were "persons" and (2) acted under "color of state law" within the meaning of Section 1983. The courts have found no problems in either area. The defendants are "persons," at least for the purpose of injunctive relief, and the interscholastic athletic associations are so entwined with the public schools that any action they take is under "color of state law."

It has also been said that even if participation in a school athletic program is a "privilege" rather than a "right," girls still cannot be treated differently from boys in an activity provided by the state. The underlying issue, in short, is not the right of girls to play a particular sport but the right of girls to be treated the same as boys unless there is a rational basis for treating them differently.

The following general principles emerge from the decided cases:

1. The various court decisions have so far been restricted in their application to noncontact sports, and some courts have plainly indicated they would rule otherwise in the case of contact sports.

2. The various court decisions come from cases in which the female plaintiffs are usually exceptional athletes. Some courts have limited their decisions to that particular factual situation; others have been less restrictive; one court, in fact, approved an injunction enjoining the Michigan interscholastic athletic association from preventing any girls in Michigan from participating fully in noncontact varsity interscholastic athletics because of their sex.

3. Even with respect to noncontact sports, there is as yet little judicial opinion on the question, sure to become more important as time passes, of whether "separate but equal" facilities for girls would satisfy constitutional requirements. At least two courts, however, have implied such facilities would be proper.

The "Little League" cases, involving girls from eight to twelve who have been excluded from playing on League baseball teams by Little League rules, have also generally been brought under Section 1983 and therefore require an initial determination of whether the local Little League (or its homegrown equivalent), usually a private nonprofit corporation, is acting under "color of state law." In one case, now on appeal, there was found to be sufficient state action when the baseball diamonds utilized by the local Little League were owned by the city, adherence by the city to the League's specifications for such fields was primarily for the benefit of the League, and the general public was often precluded from utilizing these facilities as a result of the heavy schedule engaged in by the League. But the court also took the position that baseball was a contact sport in which the "contacts" were sometimes violent. Accordingly, it found that the rule excluding girls was based on a goal of safety and was therefore reasonable.

An opposite result on the question of special danger to girls was recently reached by a New Jersey state court, where it was said that expert testimony presented to a state civil rights agency on boys' and girls' anatomies, reaction times, and maturation permitted the agency to have found as a fact that girls of ages eight to twelve were not subject to materially greater hazards of injury while playing baseball than boys of the same age group.

It is also to be noted that the parent Little League organization, which in the past has disciplined local affiliates for permitting girls to play on League teams, is a federally chartered corporation. In late December of 1974, Congress amended its charter to open the League to girls. In law, nothing is certain, but it seems likely this congressional action will dispose of most Little League litigation.

Rules Affecting Students

Rules excluding unwed mothers of school age from attending public high schools have been successfully challenged under Section 1983.

To the argument that the presence of unwed mothers in the schools would be a bad influence on other students, the courts have replied that school boards do indeed have the right to exclude a student if her presence would taint the education process, but that they cannot do this without conducting a thorough hearing at which the student must have an opportunity to show her qualifications for remaining in school.

Qualified exclusion for pregnancy has also been faulted. In one Section 1983 case, the plaintiff was a pregnant unmarried high school senior who was told she had to stop attending regular classes--though she was also told she could use the library after normal school hours, participate in senior activities, obtain tutoring at no cost, and take examinations periodically.

The hearing for a court order to reverse these decisions illustrates nicely the kind of testimony a plaintiff in such a situation should present. First the student's physician testified she was in excellent health to attend school. Another doctor testified that exclusion would cause her mental anguish which would affect the course of her pregnancy. A psychiatrist expressed the opinion that young girls in the plaintiff's position who were required to absent themselves from school became depressed, and that this depression would have an adverse effect on the child. A social worker testified it was better to give the individual girl a choice of whether to remain in class or have private instruction after regular school hours. The final touch of impressive expert testimony came from the chairman of the Guidance Program of the Harvard Graduate School of Education, who said the program the school officials had established for after-hours instruction was not educationally the equivalent of regular class attendance.

Not surprisingly, the court order was granted.[2]

Allegedly discriminatory on-campus residence rules have also been challenged on equal protection grounds. Thus, a college's requirement that all unmarried women students under 21 not living with their parents or a close relative reside on-campus could not be sustained when the sole reason for the rule was the college's own need to meet financial obligations arising out of the construction of dormitories.

In a case involving a college's curfew regulations, the female student who brought suit on equal protection grounds was less successful. The regulations in question required certain women students but no male students to be in their dormitories by prescribed but shifting times (depending on the day of the week). In upholding the regulations against the claim of discrimination based on sex, an appellate court said that the different classification for female students was justifiable on grounds of safety. Women, the court felt, were more likely to be attacked later at night and were physically less capable of defending themselves than men.

Finally, a residency rule for college tuition purposes, in which a female married student is presumed to have the domicile of her husband (thus sometimes losing eligibility for reduced tuition), may deny equal protection if married women constitute the only group whose classification for such tuition purposes is tied to the classification of someone else.

2. In a case not directly involving sex discrimination, the exclusion of a sixteen-year-old girl from participation in many extracurricular activities simply because she was a divorcee was held to be a denial of equal protection. It has also been held improper to exclude married students from such participation.

EXECUTIVE ORDER NO. 11246

Executive Order No. 11246, as amended by Executive Order No. 11375, requires government contractors, subcontractors, or contractors working on federally assisted construction projects not to discriminate on the basis of sex, to take affirmative action to remedy the effects of past sex discrimination, and to counteract sex-discriminatory barriers to equal employment opportunity. Regulations apply the Order to contractors and subcontractors holding contracts for more than $10,000.

If an educational institution, for example, has a federal contract, the Order reaches (and theoretically protects) all employees of the institution, not merely those doing the contract work or physically located in the facilities where the work is done. Administrative reviews to determine whether the educational institution is actually in compliance with the requirements of the Order may be initiated by the concerned federal agency or by the employee affected. In appropriate circumstances, the institution's federal contract can be terminated or suspended for noncompliance.

In 1969 the Women's Equity Action League initiated the strategy of filing formal complaints with the Department of Health, Education and Welfare in cases where it felt educational institutions holding federal contracts were in violation of the Order. And in November, 1974, the League, joined by the National Organization for Women and other women's groups, filed suit against HEW and the Department of Labor, alleging, among other things, a governmental pattern of nonenforcement of the requirements of the Executive Order as they applied to educational institutions.

The courts have said that Executive Order No. 11246 is a proper exercise of presidential power, that it possesses the force of statutory law, and that it has not been preempted by Title VII. It has been said, too, that the mere fact the Executive Order might force an educational institution to adopt certain hiring and promotion goals for women (to the possible detriment of men) does not violate that part of Title VII making it an unlawful employment practice not to hire or promote a particular individual because of that individual's sex.

In other words, the use of "goals" in affirmative action programs undertaken to correct past discrimination against women are permissible pursuant to the Order. But when the corrective action by the institution moves from the use of "goals" to the use of "quotas" in, for example, hiring, the courts are far less easy. Some courts have opposed any kind of imposed quota hiring system, while others, in special circumstances, have permitted the use of "one-time-only" preferences to correct imbalances caused by past discrimination.

One problem inherent in Executive Order No. 11246 is that once an employee or applicant for employment has filed a complaint with the appropriate federal agency (HEW in the case of educational institutions), he or she has no control over the proceedings.

From time to time, aggrieved individuals have challenged this part of the Order's operation, but without noticeable success. There is, for example, a principle in general contract law which sometimes permits a person not directly involved in a contractual situation but who is intended by the contracting parties to reap certain benefits from the contract to sue to enforce it on the theory that person is a "third-party beneficiary." But efforts by aggrieved individuals to enforce "third-party beneficiary" claims under the Executive Order against the contractor itself--for example, against an educational institution with a federal contract--have been rejected.

At the same time, some decisions have suggested that individuals aggrieved by a contractor's failure to comply with the requirements of the Order can obtain a judgment in the nature of mandamus[1] against the federal officials charged with enforcement. Other courts have added the qualification that the aggrieved individual must first exhaust the available administrative remedies. In the case of a woman in education, this would mean she would first have to initiate and pursue an appropriate complaint with HEW.

And recently it has been said that if an aggrieved individual has in fact exhausted all available administrative remedies provided by the Executive Order, he or she than has standing to maintain an action against the employer directly.

1. Mandamus is a legal word of art used to describe a court order requiring a government official to perform an act belonging to his public, official, or so-called ministerial duties.

> The manager of the Western Division of defendant, * * * when warned * * * of the imminence of passage in Congress of the Equal Pay Act of 1963, remarked, "The Congress would never pass such a foolish law as that."
>
> This "foolish" law is now before the Court for interpretation * * *. The case for the plaintiff was presented by a feminine attorney of the Department of Labor, resisted by a masculine attorney of the Nevada Bar, and considered by a Judge who, for the purposes of this case at least, must be sexless, a possibility not apparent when the oath of office was taken and one which may bespeak the appointment of older judges.
>
> From the opinion of Thompson, J., in Wirtz v. Basic Incorporated, the first case (1966) decided under the Equal Pay Act

THE EQUAL PAY ACT

Since at least 1945, there have been periodic attempts to enact federal legislation providing that women must receive the same pay as men for the same kind of work. For varying reasons, these different attempts floundered--until 1963, when Congress passed the Equal Pay Act.

The coverage of the Equal Pay Act (hereafter referred to as the EPA) is defined in highly technical statutory language replete with references to an employee's connection with "commerce," but for practical purposes here it can be said the EPA applies to almost every kind of educational institution. However, until 1972 it did not cover individuals employed "in a bona fide executive, administrative, or professional capacity." As a result, the existing judicial precedents have developed from cases involving women employees who are generally at the lower end of the wage scale. Many of these principles remain valid for women employed in executive, administrative, or professional capacities, but new principles applicable to the special complexities of this type of employment are sure to emerge as cases now in the courts reach the decision stage.

The EPA provides in substance that an employer must not pay different wages to employees of opposite sexes in the same "establishment" for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

On the surface, this language seems straightforward enough, but lawyers, in lawyerly fashion, have successfully challenged, tested, and argued the meaning of each operative word--"establishment," "equal work," "equal skill," "equal effort," and so on--with the result that the decided cases are filled with learned and often confusing explanations of what these words, so innocuous in everyday English, really mean in the special world of legal oratory.

To complicate matters further, the EPA provides that pay does not have to be equal where it is made pursuant to "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." (Only lawyers could devise a phrase as arcane as "any other factor other than sex," and as might be expected, litigants' attorneys have had

a field day with it.)

Finally, the EPA provides that an employer paying a wage in conflict with the law's requirements must not reduce the wage of an employee in order to bring itself into compliance. That is, if women are receiving less than men, the employer cannot lower men's wages, it must increase women's wages.

An aggrieved employee has the right to sue the employer and can ask for, among other things, back pay and liquidated damages. The Secretary of Labor can also bring an action to recover back wages or he can ask for an injunction, but once the Secretary sues, the employee's right to do so is terminated.

It should also be kept in mind that one part of Title VII exempts differences in compensation authorized by the EPA.

With all the above as a general introduction, and with the promise of more confusion to come, it is possible to consider the decided cases.

The EPA, one court has said, was intended as a broad charter of women's rights in the economic field, which sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences that flow from it.

In accordance with this remedial philosophy, it was said in a 1975 case involving a challenge to a salary equalization formula by which salaries of female faculty members and administrative employees at the University of Nebraska were adjusted to bring them more into line with those of male employees, that the fact a formula for adjusting salaries was not applied to male employees did not violate the EPA in the absence of any evidence males were actually being paid less than their female counterparts.

The Supreme Court has recently said that in an EPA case, the plaintiff has the burden of proving the employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" in the same establishment. Once the plaintiff has carried this burden, the burden shifts to the employer to show the differential is justified by a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex.

These various burdens will now be examined in order.

Equal Work

For the first few years of the EPA, there was uncertainty as to whether its legislative history required the term "equal work" to be treated as the equivalent of "identical work." But in 1970, the judicial principle was firmly established that the compared jobs need not be identical but only "substantially equal." But the degree of equality is difficult to define. One court has said:

> While the standard of equality is clearly higher than mere comparability yet lower than absolute identity, there remains an area of equality under the Act the metes and bounds of which are still indefinite. * * * Like many other legal concepts, that of equality under the Equal Pay Act is susceptible of definition only by contextual study.

In other words, the court is saying, the definition of "equal work" depends to a great extent on the facts

of the particular case. Nevertheless, the courts generally agree on these points:

1. While small differences in job requirements can easily be made, they make no real difference where the work is substantially the same.

2. The EPA does not authorize courts to equalize wages merely because two substantially different jobs are worth the same monetarily to the educational institution.

3. Jobs can have different titles and still be substantially equal, but two jobs are not necessarily equal because they have the same title.

4. The controlling factor is job content, not an educational institution's job description.

5. Where jobs are substantially equal, differences in subsidiary tasks do not render them unequal, in the absence of evidence showing that the subsidiary tasks require significantly greater skill, effort, and responsibility.

6. A job performed by women during the day at an educational institution which is substantially equal to a job performed by men at night must have the same base pay (though extra pay can be added to base pay for night work as long as it is open to both men and women).

Illustrative of these general concepts is a recent case in which a school district employed a female as a teacher and a girls' softball coach, and a male as a teacher and boys' softball coach. Both had no particular experience in coaching, but the male was paid one-third more. The duties of both coaches consisted of recruiting and supervising teams, accounting for equipment and uniforms, and arranging schedules of practice and outside games. There was a violation of the EPA, the court said, because:

> There may exist incidental differences in the jobs performed by the male and female but such differences are inconsequential and are not performed during any substantial period of time, nor do they require greater expenditure of skill, effort and/or responsibility.

Equal Skill

The administrative interpretation of "equal skill" provides that skill includes such factors as experience, training, education, and ability, and must be measured in terms of the performance requirements of the job; furthermore, possession of a skill not needed to meet the requirements of the job cannot be considered in making a determination regarding equality of skill.

In a case involving male and female custodians, it was held that the skill required by male custodians for the operation of floor buffers and similar devices and the skill required by female custodians for cleaning venetian blinds with tools were "equal." Thus, even if the duties are different, there can still be equal skill if the two jobs are fundamentally similar.

Even where special skills are required, a pay differential is not justified if this part of the job requires an insignificant amount of time. And if a differential is justified, it should be applied only to the identifiable period during which the special skills are employed.

Equal Effort

"Equal effort" includes mental as well as physical exertion, and to justify a differential it must be shown that the more highly paid job (1) requires extra effort, (2) consumes a significant amount of the time of all

those whose pay differentials are to be justified in terms of it, and (3) is of economic value commensurate with the pay differential.

Many cases have considered the "equal effort" question in comparisons between the jobs of male and female custodians employed by educational institutions. In one representative case, it was said:

> The additional duties performed by (male) custodians, including climbing high ladders, working on scaffolding, operating floor scrubbing and buffing machines * * * do not require a degree of skill, effort and responsibility which differs in an appreciable way from that required of the matron custodians in the performance of their routine duties. Moreover, these additional duties performed by the custodians occupy only an insubstantial amount of each custodian's time.

Equal Responsibility

"Equal responsibility" deals with the degree of accountability required in the performance of the job.

In a case involving a retail store, a wage differential was held not improper where one male department head, in addition to the responsibilities he had in common with women department heads, was also in charge of the warehouse and home delivery.

In a case involving a bank, a wage differential was not improper where the duties of a male exchange teller were such that his errors could not be easily corrected in the internal operation of the bank, while those of a female note teller could be. In addition, even when a note teller temporarily took on the duties of an exchange teller, the particular exchange teller was not relieved of accountability and responsibility.

Differences in the degree of supervision exercised over male and female employees in jobs otherwise the same, or differences in the degree of supervision they exercise, can also justify wage differentials.

Similar Working Conditions

There is no violation of the EPA if otherwise equal jobs are performed under dissimilar working conditions.

The Supreme Court has held that a man working at night and doing the same work as a woman working during the day does not have different "working conditions" within the meaning of the EPA.

The word "similar," the courts have said, is less exacting than the word "equal," and work performed in essentially the same surroundings will not justify a differential based on "dissimilarity" of working condidtions. Work performed by male and female custodians in different parts of a school building, for example, does not constitute dissimilar working conditions. And in a case involving a Sears Roebuck store, it was said the mere fact jobs are in different departments of an establishment does not necessarily mean they are performed under dissimilar working conditions.

The Same Establishment

This is an area of special concern to women in education, particularly those working for a school system or for a university with autonomous administrative divisions in different buildings on the same campus or on different campuses in the same community, or with scattered campuses throughout an entire state.

The Supreme Court has said the word "establishment," as used in the Fair Labor Standards Act, of which the

EPA is a part, means a "distinct physical place of business" rather than "an entire business or enterprise."

Thus, a unit store in a chain store system would constitute the "establishment," but not the individual departments within the store.

However, a court which was called on to decide whether a comparison between the wages of a male in one college building and those of females in other college buildings on the same campus was proper concluded it was because:

> The defendant college is constituted of numerous classroom, research, administration and residence buildings located on a thirty-acre campus in a rural community in western Pennsylvania. Defendant clearly regards itself as a single integrated operation maintaining centralized administrative, bookkeeping and personnel offices. Employees and students work and utilize all of defendant's facilities as if the confines of the campus set the outside boundry (sic) of a large building or distinct physical place of business. (Emphasis supplied.)

And although the concept of the "same establishment" was not an explicit issue in the University of Nebraska case mentioned earlier in this section, comparisons of salaries of male and female faculty members and administrative employees were apparently made by using the university's system-wide job-classification data on three different campuses and at a county experimental station connected with the College of Agriculture. (This is not to say, however, that different campuses do represent the same establishment.)

It has also been held that job and pay comparisons between male and female custodians throughout a school district consisting of 35 schools and an administration building were proper because the school board itself viewed each employee as working within one integrated school system.

Affirmative Defenses

Even though a plaintiff has proven all the elements required to establish a violation of the EPA, there is nevertheless no violation if it can be shown the difference in payments to men and women was made pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex.

Under these exceptions, a de facto (as opposed to a formalized) seniority system has been held to justify higher payments to a male hired two years before the female complainant.

With respect to merit systems in general, it was said in one case that the question of whether a university violated the EPA by systematically discriminating against female faculty members regarding their pay solely on the basis of sex or whether the plaintiff's teaching job was within its exceptions because the pay of full, associate, and assistant professors was based on merit and the quality of their work products, involved material issues of fact, making it improper to grant a summary judgment.

But where an educational institution has only general guidelines and no specific criteria for determining which employees are better and where within a salary range an employee should be paid, and merit raises have not been given to female employees, and the operation of the merit system has never been communicated to the involved employees, it will not justify a differential.

However, court approval has been given a merit system in which officers and directors of the defendant employer held quarterly meetings for the purpose of evaluating employees, and officers in charge of the various departments

of the business expressed their views as to the competence, interest, and value to the employer of the employees in question.

Nevertheless, an educational institution cannot consistently hire women at a lower starting wage and then be immune to an EPA action because some women, after long periods of service, ultimately reach higher salary levels than men subsequently hired. To condone such a practice, one court has said, would permit widespread discrimination against women as a group, either automatically through general periodical increments added to a discriminatory starting salary, or deliberately through the selection of a few women for favorable treatment or a few men for unfavorable treatment.

Where there is a bona fide seniority or merit system but the starting wage is discriminatory, the seniority or merit system is not invalidated. Rather, the starting wage for affected employees has to be retroactively adjusted.

The fourth EPA exception, that of the payment of a differential based "on any other factor other than sex," has, by its very nature as a catch-all, generated the most litigation.

Under appropriate circumstances, prior work experience and superior formal education can be a "factor other than sex." But the employer has to show that the prior experience or the superior formal education is relevant to the job in question.

Higher employment costs for women as a group than for men as a group (with respect to unemployment compensation, workmen's compensation, and accident and health insurance) are not a "factor other than sex." Nor is the fact women have a weaker bargaining position in the marketplace.

On the other hand, there has been judicial rejection of a narrow construction urged by the Department of Labor, namely, that a "factor other than sex" must always be a factor directly related to job performance or typically used in setting wage rates.

Many of the "factor other than sex" cases involve employer training programs, which if bona fide and applied regardless of sex, can in appropriate circumstances justify unequal pay. But the courts examine the programs closely and tend to reject them if they are too unstructured.

Reconciliation of the EPA and Title VII

The two acts, the courts have said, cover the subject matter (namely, compensation), and therefore the EPA must not be construed in a way that would, because of the exemption given in one part of Title VII for compensation differentials authorized by the EPA, undermine Title VII as a whole. The tail, in short, must not be allowed to wag the dog.

Furthermore, Title VII rights are independent of rights created by other statutes, such as the EPA, and where remedies overlap, a plaintiff may select the avenue of relief that seems most appropriate.

In conclusion, it cannot be emphasized too strongly that the very special problems faced by women in education when they invoke the EPA--problems, for example, inherent in the way academic employees in higher education

are hired and promoted, or problems concerning the appropriateness of job and pay comparisons between different college divisions or university campuses--have not been judicially resolved because employees in bona fide executive, administrative, or professional capacities so recently came within its purview.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX provides in part that no person shall, on the basis of sex, be subjected to discrimination under any education program receiving federal financial assistance.

With respect to admissions, however, Title IX applies only to institutions of vocational education, professional education, graduate higher education, and to public institutions of undergraduate higher education. (One-sex institutions changing to two-sex institutions have grace periods not material here, and traditionally one-sex public undergraduate institutions do not have to change present admission policies.)

Title IX also exempts from its operation certain religious, military, and merchant marine educational institutions.

An amendment at the end of 1974 also exempted the membership practices of certain student social fraternities and sororities, as well as those of such organizations as the YWCA, YMCA, Girl Scouts, and Boy Scouts.

Regrettably, it has to be said that as of the time this study was in preparation, there were no officially reported cases dealing with this important legislative addition to the equal rights of women in education. This absence of cases is due in part to a delay in issuance of guidelines by the Department of Health, Education and Welfare, in part to the normal delay between the initiation of a case and its decision on the merits, and in part, probably, to uncertainty as to whether aggrieved individuals have a private right to sue under Title IX.

However, Title IX is generally considered to be modeled on Title VI of the Civil Rights Act of 1964, which prohibits discrimination because of race, color, or national origin in any program receiving federal financial assistance, and it has been held that individuals aggrieved under Title VI do have such a right.

It has also been held under Title VI that its provisions for a termination of funding where discrimination is found to exist permit termination where federal funds "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment * * *." (Emphasis supplied.) But if a particular program receiving such funding is insulated from the discrimination found to exist in some other federally funded program operated by the same institution, termination is not automatically justified on a theory of "guilt by association."

This seeming restriction on termination of funding, however, does not necessarily mean that the broad prohibition on discrimination in Title VI (and by analogy, in Title IX) is similarly restricted to only those federally funded programs in which discrimination has been found to exist. It can be argued, in fact, that the broad prohibition extends to the overall education program offered by the beneficiary of federal financial assistance.

It is to be noted, also, that the previously mentioned 1974 suit brought by the Women's Equity Action League, the National Organization for Women, and other women's groups against HEW and the Department of Labor under Executive Order No. 11246 also invokes Title IX. Similar though not as sweeping suits have been instituted elsewhere.

COMPREHENSIVE HEALTH MANPOWER TRAINING ACT OF 1971

AND NURSE TRAINING ACT OF 1971

These acts, among other things, amend Title VII and Title VIII of the Public Health Service Act of 1944, as amended, by prohibiting the Department of Health, Education and Welfare from making grants, loan guarantees, or interest subsidy payments to any medical or similar health-training school unless the application for such federal assistance contains satisfactory assurances the school will not discriminate on the basis of sex in the admission of individuals to its training programs.

There appear to be no officially reported cases involving these two laws, although they too are involved in the suit brought by the women's groups mentioned previously.

Notes to Part I

The two epigraphs on the title page come respectively from Page 74, Flexner, Century of Struggle, Harvard University Press, 1959, and Pages 307-9, Gurko, The Ladies of Seneca Falls, Macmillan, 1974.

The de Tocqueville epigraph at the beginning of The Flowering of Romantic Paternalism comes from Page 577, Democracy in America, edited by J.P. Mayer and Max Lerner, Harper and Row, 1966.

The Ashley Montagu quotation in the first section comes from Page 181, Man's Most Dangerous Myth: The Fallacy of Race, 4th Ed., World Publishing Co., 1964.

The quotations from Congressman Celler and Congresswoman Green come from Pages 2578 and 2581, respectively, of 110 Congressional Record (1964).

The epigraph at the beginning of Sex Discrimination in Employment--Hiring, Promotion, and Transfer comes from Page 541, Sail'er Inn, Inc. v. Kirby, 485 P.2d 529 (Cal. 1971).

The epigraph at the beginning of Sex Discrimination in Employment--Maternity and Pregnancy Policies comes from Pages 422-3, Turner v. Department of Employment Security, ___ P.2d ___, 10 FEP Cases 422 (Utah 1975).

The epigraph at the beginning of The Equal Pay Act comes from Page 787, Wirtz v. Basic Incorporated, 256 F. Supp. 786 (Nev. 1966).

QUICK REFERENCE SUMMARY (I)

Equal Protection Clause and Section 1983

Prohibition on all sex discrimination in education if "state action " involved.

Plaintiff must show alleged disparate treatment between men and women is based on arbitrary system of classification. Plaintiff fails if court finds classification reasonable, not arbitrary, and that it rests on some ground of difference having fair and substantial relation to object of classification. But court does not have to accept at face value defendant's assertions of benign, noninvidious purpose in system of classification. Archaic and overbroad generalizations about women as a class will therefore be rejected.

Section 1981

Question of whether section prohibits sex discrimination is speculative at this time. But if it does, "state action" not required.

Section 1985(3)

Does not require "state action" in case of private conspiracies aimed at invidiously discriminatory deprivation of equal rights secured to all by law. But there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. Supreme Court has not yet ruled on whether sex discrimination would be such a class-based animus. Several lower courts have said sex discrimination (at least in area of employment) does qualify.

Title VII

Prohibition on sex discrimination in educational employment. This includes prohibition on all seemingly neutral employment practices that have practical effect of freezing status quo of prior discriminatory practices--unless such practices can be justified by business necessity. But the phrase "business necessity" means there must be an overriding business purpose such that the practice is necessary to the safe and efficient operation of the institution.

Sex discrimination also permitted if sex a bona fide occupational qualification reasonably necessary to normal operation of educational employer. But exception is narrowly construed and employer must show it has factual basis for believing that all or substantially all women are unable to perform the particular job. And the phrase "reasonably necessary" means discrimination on basis of sex valid only when essence of employer's operation would be undermined by not hiring members of one sex exclusively.

Employment practices possibly otherwise discriminatory also permitted pursuant to bona fide seniority or merit system, or when employees work in different locations, provided such practices not result of intention to discriminate because of sex. Differences in compensation also permissible if authorized by Equal Pay Act.

Employer cannot escape mandate of Title VII by combining sex with another factor, such as parenthood, age, height, etc., for purposes of employment unless same factor applied to males.

Most state protective laws invalid to extent they conflict with Title VII.

Hiring and promotion practices not shown to be authoritatively related to job performance generally invalid if they result in discrimination against women. Educational employers must have defined criteria for hiring and promotion.

Stereotypes about women as class forbidden. Each woman must be judged individually.

Specific Areas of Sex Discrimination

Mandatory maternity leave policies at fixed times during pregnancy (unless affecting only last few weeks of pregnancy and medically and otherwise properly supported) are unlawful. If employer has program providing for wage continuation during temporary disabilities, temporary absence because of pregnancy must be included.

Generally improper to refuse to hire unwed mother or to discharge unwed pregnant employee.

Generally improper to discriminate against women with respect to pension and other fringe benefits of employment. However, not improper at this time to lay off women pursuant to bona fide "last hired, first fired" seniority system.

With respect to academic employment in higher education, courts reluctant to interfere with educators' bona fide professional judgments.

In two-sex schools, admission policies that discriminate against women as a class are improper.

High-school interscholastic athletic association rules that exclude girl students from interscholastic competition in noncontact sports generally improper.

Arbitrary exclusion of pregnant or female married students from school generally improper. A different question may arise if both male and female married students excluded.

College rules requiring only females to live on-campus solely for convenience of college generally improper.

Executive Order No. 11246, as amended

Prohibits sex discrimination in employment by educational institutions having federal contracts over $10,000. Executive Order reaches all employees of institution.

Aggrieved employee does not have right to sue allegedly offending institution directly, but after exhausting administrative remedies probably may bring mandamus action against government officials charged with enforcement of Order.

Equal Pay Act

Prohibits sex discrimination in wages (including most fringe benefits).

Plaintiff must show employer differentiates between men and women for equal work on jobs performance of which requires equal skill, effort, and responsibility under similar working conditions in same establishment. But no violation exists if such different payments made pursuant to seniority system, merit system, system which measures earning by quantity or quality of production, or if based on any other factor other than sex. Also, employer cannot lower wages of higher-paid sex in order to comply with law.

Work done at night does not justify base wage greater than same work done during day, and night work does not constitute different "working conditions."

Term "equal work" means "substantially equal."

Term "equal skill" includes experience, training, education, and ability, and must be measured in terms of performance requirements of job.

Term "equal effort" includes mental as well as physical exertion.

Term "equal responsibility" concerned with degree of accountability required.

Term "same establishment" means a distinct physical place of business rather than an entire business or enterprise, but some cases have said a school system or small college meets this test when employer itself treats all its operations as being part of one unit.

Title IX

Prohibits sex discrimination in any education program receiving federal financial assistance, with certain exceptions relative to admissions. Unstated whether aggrieved individual has private right to sue, but probably does.

Titles VII and VIII, Public Health Service Act

Prohibit sex discrimination in admissions by medical and similar health-training schools receiving federal grants, loan guarantees, or interest subsidy payments. By HEW regulation, also prohibit such discrimination against employees working in such programs.

Quick Reference Summary (II)

Shown on next page, but does not indicate various coverage exemptions noted elsewhere.

QUICK REFERENCE SUMMARY (II)

	1 Equal Protection Clause	2 42 U.S.C. Sec. 1981	3 42 U.S.C. Sec. 1983	4 42 U.S.C. Sec. 1985(3)	5 Title VII of Civil Rights Act of 1964	6 Executive Order No. 11246 as amended	7 Equal Pay Act	8 Title IX of Education Amendments of 1972	9 Titles VII and VIII of Public Health Service Act
Coverage	Any person violating equal protection clause where "state action" involved	Any person denying any other person equal benefit of laws for the security of persons and property as enjoyed by white citizens	Any person acting under color of law and subjecting any other person to deprivation of rights, privileges, or immunities secured by Constitution and laws	Two or more persons who conspire to deprive any other person of equal protection of the laws, or of equal privileges and immunities under the laws, when one of such two or more persons does act in furtherance of conspiracy	Employers engaged in industry affecting commerce who have 15 or more employees	Employers with federal contracts of more than $10,000.	Employees engaged in commerce or in production of goods for commerce or employed in enterprise engaged in production of goods for commerce	Educational institutions receiving federal financial assistance	Medical and similar health-training institutions receiving any federal grant, loan guarantee, or interest subsidy payment
Kind of sex discrimination prohibited	Any kind offensive to equal protection clause	At present, most courts say sex discrimination not covered	Any kind involving deprivation of rights, privileges, or immunities secured by Constitution and laws	No Supreme Court decision yet on whether sex discrimination covered, but several courts have said does cover sex discrimination in employment	Employment	Employment	Wages (including most fringe benefits)	Against students (with certain exceptions relative to admissions), and most probably against employees	Against admission of students (and by HEW regulations against employees working in their training programs).
Some form of "state action" necessary	Yes	Not applicable at present	Yes	No, not in case of invidiously discriminatory conspiracy	No	No	No	No	No
Necessary to utilize administrative remedies before filing suit against allegedly offending party	No	Not applicable at present	No	No	Yes	Yes	No, optional	Unknown at this time	Unknown at this time
Back pay allowable	Yes. Applicable state statute of Limitations determines time	Not applicable at present	Yes, same as (1)	If action maintainable, Yes, same as (1)	Yes, for two years from filing of complaint with EEOC	HEW can seek back pay under certain circumstances	Yes, for two years; three if employer's violation willful	Unknown at this time	Unknown at this time

A FEW QUESTIONS AND ANSWERS[1]

The few questions and answers that follow are illustrative only, and are intended to demonstrate the complexity of even simple situations, and thus the need to obtain legal advice when any such situations arise.

Q. I applied for a job in the treasurer's office at a state university and did not get it because it was necessary to take a competitive examination in which, by state law, five extra points were given to anyone who was a Vietnam veteran. The man who got the job would have been three points below me without the special veteran's preference. Does this law violate Title VII?

A. Your question illustrates the so-called "neutral rule" concept. If an employer voluntarily gave such veterans a preference, this seemingly neutral rule could possibly discriminate against women because, out of the total of all Vietnam veterans, only a small percentage would be likely to be female. The fact the rule is imposed by state law rather than by the employer does not substantially alter the legal result. To the extent such a law conflicts with Title VII, it would probably be invalid.

Q. The college I applied to for a job turned me down. Does Title VII entitle me to ask for its reasons?

A. Not as a matter of right, but in the event you decide to bring a charge of sex discrimination and can show discrimination exists, the college will have to supply its reasons for not hiring you, because it has to demonstrate it used objective, well-defined criteria not based on sex. If it has no formalized criteria but relies on undefined impressions of interviewers, it is in trouble.

Q. I have had ten years' experience as a dean of girls in a high school. I recently moved to another city and learned of a job as dean of boys in a high school. The personnel director refused to consider me because the boys' dean, he said, had to be a man. Does this violate Title VII?

A. One theory has it that such a job does not qualify for a BFOQ exception, because the job of dean can be separated into three components, administration, discipline, and counseling, and while counseling of boys might arguably be done better by men, the school could nevertheless separate the job's components, permitting a woman to perform the first two. On this theory, there is a violation, but there is no flat answer. More facts concerning the dean's actual duties are needed.

Q. I applied for a job as bookkeeper in a small boys' private school with ninety students and ten teachers, a secretary, a janitor, and, of course, the headmaster. I was turned down, and learned through a friend it was because the headmaster does not think women can handle figures. Does this violate Title VII?

A. No, because the school does not have 15 or more employees.

1. The questions, whether express on the point or not, involve only the issue of sex discrimination. They are asked by various hypothetical females. The answers are provided by the consultant, who is male, mortal, and fallible. Allowances should be made. Allowances aside, the answers are subjective and speculative.

Q. I applied for a job as bookkeeper in a Catholic seminary for priests. I am Catholic, but was turned down because it is the policy of the seminary that only men can work there. Does this violate Title VII?

A. Title VII's exemption of certain of the employment practices of a religious educational institution does not extend to sex discrimination. Therefore the seminary must establish that being male is a BFOQ for the job of bookkeeper, and its preference for or policy of males only is not of itself sufficient to establish the exception. On the other hand, if the refusal to hire women is based not merely on policy but on religious tenets, there might be a conflict with the First Amendment if an exception were not allowed. Title IX, for example, exempts educational institutions controlled by a religious organization if applying it would not be consistent with the organization's religious tenets.

Q. I teach at a high school and am also the third-ranked woman tennis player in my state. To earn some extra money, I applied for the job of coach of the boys' tennis team (there is no team for girls). A male teacher with negligible tennis ability was appointed instead. Does this violate Title VII?

A. Probably, unless legitimate and necessary duties of the job require the coach to confer with the players in the locker room, or to use the same locker room, showers, and lavatory, in which case accepted norms of privacy would permit a BFOQ exception. But any preference the players themselves might have for a male coach would not justify an exception.

Q. There are 150 teachers in the Economics Department at our university. Recently eight of us, four men and four women, attended a professional conference at university expense. The university paid for separate hotel rooms for the men, but the women had to share two rooms with double beds. Does this violate Title VII?

A. More facts are needed. If men with the same or a lower academic rank than the highest-ranking woman were given private rooms, Title VII was probably violated. But private rooms for men with higher ranks than any of the women might be justified as a perquisite of seniority or on a showing that women who held this same higher rank were also customarily given private rooms.

Q. Recently I and another woman from the Economics Department attended an interdisciplinary conference in another city. Our university, which paid our expenses, required us to share the same hotel room, but paid for separate rooms for two men with the same academic rank from the Psychology Department. Does this violate Title VII?

A. Maybe, maybe not. Title VII does not require that a female academic receive the same perquisites as <u>any</u> other male academic of the same rank. It requires only that there be no underlying discrimination based on sex. Thus, if female employees of the same rank in the Psychology Department are given separate rooms when they attend such conferences or if male employees of the same rank in your department are required to share hotel rooms in such situations, there is no violation, because the discrimination is not sex-based, it is department-based.

Furthermore, one of the uncharted areas of great complexity in the application of Title VII to educational employment is this very question of comparisons between different academic departments. That is, if you are in

the English Department, can you compare your conditions and privileges of employment only with those of men in the English Department, or can you also invoke comparisons with men in the other language departments? If learning and teaching Chinese is far more difficult than learning and teaching French (or English, for that matter), perhaps such comparisons are invalid. And even if they are valid, can you, as a member of the English faculty, make comparisons with male members of the Physics or other nonlanguage faculties? Future litigation will have to provide the answers.

Q. I applied for the job of director of admissions at a boy's' private school and was turned down. The headmaster said he had to have a man in this position, since it involved traveling around the country interviewing prospective students and their parents. Does this violate Title VII?

A. If the only reason for the refusal to hire is a stereotyped belief women are unsuitable for jobs that require travel, Title VII is probably violated. If the reason for the refusal to hire is based on the demonstrable (as opposed to assumed) fact that only men can gain the confidence of prospective boy students in such interviewing situations, the problem is more complicated, but even here an employer would have to show that all, or substantially all, women could not perform the job satisfactorily. On balance, there is most likely a violation.

Q. I work in the Alumni Relations Office of a large university. My supervisor, a woman, won't let any of us wear pants suits. Does this violate Title VII?

A. The fact the supervisor is a woman does not negate the possibility of a violation if she is acting on behalf of the university and not on her own whim, and to the extent the edict is based on stereotypes about what women should or should not wear at work, it is objectionable. There is a caveat, however. If women are permitted to wear pants suits, the university might have to permit male transvestites to wear dresses. Since such a policy might conflict with judicially maintainable community norms of acceptable behavior, the university might well argue it was entitled to forbid any employee to wear clothing considered (by community standards) to identify the opposite sex. Even within this argument, however, it would be difficult to establish that pants suits designed for women were identical with community-defined conventional male attire. On balance, therefore, the answer to your question is probably Yes.

Q. My husband and I teach Physics and Chemistry respectively in the same college. Because of recent budgetary problems and the consequent necessity to reduce the number of employees, the Science Department has decided to invoke a long-standing but previously ignored nepotism rule which says a husband and wife cannot teach in the same department. Does this rule violate Title VII?

A. If, in language or application, the rule forces only the woman to resign, it does violate Title VII. But if it gives the affected couple a choice as to which of the two must resign, and if there is a legitimate business reason behind the rule, it probably does not. But there is another issue your question neglects. If the rule has been previously ignored and is invoked now only to provide a means to bring the payroll within manageable proportions, it may be improper on other legal grounds.

Q. There seem to be lot of Title VII cases saying that since pregnancy is a condition unique to women, it is improper to penalize them if they have to be absent from work because of pregnancy. In line with this reasoning, is it a violation of Title VII if an employer discharges a woman because extreme physical discomfort during her periods consistently results in her missing several days of work almost every month?

A. Probably not. The fact that most female employees, whatever their discomfort, do not miss work on a regular basis, militates against special treatment for those who do. And certainly there is no sex based discrimination if an employer would similarly discharge a male employee who was consistently absent because of a physical condition peculiar to males, such as prostate trouble.

Q. I have recently begun teaching in the History Department of a large university. Because of an affirmative action program, inequities in the hiring, promotion, and salaries of women in the whole university system have been substantially corrected. However, I and other women in the department find ourselves teaching the least desirable courses, such as the introductory history course required of all freshmen. Does this kind of departmental policy violate Title VII?

A. It is a tough call. The courts have a pronounced reluctance to second guess discretionary professional judgments, and many such judgments are additionally protected by one or more aspects of academic freedom. But if you could clearly establish (and it would not be easy) that the teaching assignments themselves were sexually discriminatory, there would be a violation, because teaching assignments are one of the terms or conditions of academic employment.

Q. I have completed all the work for my Ph.D. except for finishing my thesis. I applied for a teaching job in the same university and was rejected because the department claims to have a policy of hiring only Ph.D.'s. However, three months later a male who had finished his thesis but had not yet submitted it was hired. Does this violate Title VII?

A. Possibly. But if the exception to the policy was made because of some emergency (such as an unexpected resignation), the department would certainly be entitled to hire the best qualified applicant. The male who had completed his thesis might arguably be better qualified than someone such as you, who had not.

Q. I have an M.A. and have taught several courses in Computer Programming for three years. A male with a freshly minted Ph.D. and no teaching experience is teaching the identical courses (and has no other duties), but he is paid more. Does this violate Title VII?

A. Not if an equally inexperienced female Ph.D. teaching the same courses would be paid the same as the male Ph.D. The discrimination is based not on sex but on the kind of degree the employee has.

But if no female Ph.D. has ever taught these courses, and if there is no evidence to prove (or disprove) that the employer pays male and female Ph.D.'s of equivalent experience the same, the question becomes more difficult. Many cases have said, at least with respect to hiring and promotion practices, that educational requirements producing a discriminatory effect have to be job related, and thus there is perhaps an implication

that where seemingly sex-discriminatory pay differentials are based on differences in education, the superior education must be shown to yield superior job performance. (Some cases decided under the Equal Pay Act have approved higher pay where superior education is shown, but it has also been indicated that the employer must show the relevance of the superior education to the duties the employees perform.) However, the courts have not yet confronted the difficult question of whether the academic practice of paying the holder of a Ph.D. more than a nonholder (where duties are the same and the differential would otherwise be discriminatory under Title VII) is proper. On balance, the additional pay for the Ph.D. could probably be justified, but in your particular case it could also be argued your three years' teaching experience was an equalizing factor.

Q. I am a new Ph.D. and teach several courses in Computer Programming. A male with a new M.A. teaches the identical courses and receives the same pay. Does this violate Title VII?
A. Not necessarily. You would have to show that your department pays a Ph.D. more than an M.A. when the work assignments are identical.

Q. I have just received a Ph.D. and am teaching college English. We share the same building with the History and Philosophy Departments. A male philosophy teacher who has just received his Ph.D. receives more than I do. Does this violate the Equal Pay Act?
A. You are working in the same establishment, but you are probably not performing equal work requiring equal skill, effort, and responsibility under similar working conditions. It is a question of fact, and the courts have not yet confronted the question of whether academics of the same rank in different departments are performing equal work. Since a shortage, say, of philosophy Ph.D.'s might justify higher wages throughout the scale, it would seem difficult for a court to order arbitrary equalization between male philosophy teachers and female English teachers.

Q. I have just received a Ph.D. and am teaching English at the South Campus of a community college. A man who just received his Ph.D. and is teaching the same courses at the North Campus on the other side of town receives more than I do. Does this violate the Equal Pay Act?
A. It depends on whether you are part of the same establishment, and there is not enough judicial authority in this area to give an informed answer. But if the two campuses are administered as one indivisible, cohesive unit, etc., they could well be one establishment.

PART II

APPENDIX A

HISTORICAL OVERVIEW OF THE EQUAL

PROTECTION CLAUSE AS APPLIED IN SEX DISCRIMINATION CASES

The Fourteenth Amendment provides in part that:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const., amend. XIV, Sec. 1.

GENERAL COMMENTARY:

The first attempts to invoke this part of the Fourteenth Amendment, and in particular, the equal protection clause, to challenge state action (usually state laws) allegedly involving sex discrimination were hampered by deeply rooted nineteenth-century concepts of woman's role in society. As Ashley Montagu has said:[1]

> In the nineteenth century it was fairly generally believed that women were inferior creatures. Was it not a fact that women had smaller brains than men? Was it not apparent to everyone that their intelligence was lower, that they were essentially creatures of emotion rather than of reason--volatile swooning natures whose powers of concentration were severely limited and whose creative abilities were restricted almost entirely to knitting and childbirth? * * * Women had practically no executive ability, were quite unable to manage the domestic finances, and, as for competing with men in the business or professional world, such an idea was utterly preposterous, for women were held to possess neither the necessary intelligence nor the equally unattainable stamina. Man's place was out in the world earning a living; woman's place was definitely in the home.

It was against this background and tradition that the United States Supreme Court, in Bradwell v. State, 83 U.S. (16 Wall.) 130 (1872), upheld the denial to a woman of the right to practice law in Illinois.[2] The right, it said, was not one of the privileges and immunities of citizenship. In a famous (or perhaps infamous) concurring opinion, Justice Bradley said (pg. 141):

> The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood * * *. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.

Notwithstanding Justice Bradley's fortuitous discovery of the Law of the Creator, women were simultaneously entering the labor force--at its lowest end--in ever increasing numbers. For example, the approximately 2,600,000 women gainfully employed in 1880 grew to 4,000,000 ten years later.[3] But low wages, long hours, and sweatshop conditions were the rule, and activists such as Josephine Goldmark were accordingly trying to develop protective legislation for women and children. But were such legislative intrusions into business and commerce

1. Pg. 181, Man's Most Dangerous Myth: The Fallacy of Race, 4th Ed., World Publishing Co., 1964.

2. Illinois did not even bother to be represented by counsel. See also In re Lockwood, 154 U.S. 116, 14 S.Ct. 1082 (1894).

3. Pg. 193, Flexner, Century of Struggle, Harvard University Press, 1959.

constitutional? No one was quite sure, because the Supreme Court, in Lochner v. New York, 198 U.S. 45, 25 S.Ct. 539 (1905), had invalidated similar protective legislation (maximum hours) as applied to men.

The answer came in 1908 in the landmark case of Muller v. Oregon, 208 U.S. 412, 28 S.Ct. 324, when the Court upheld the constitutionality of an Oregon maximum-hours law for women. The plaintiff, however, was not a woman but a male laundry-owner contesting a ten-dollar fine for having violated the law.[4]

The Muller Court justified special legislation restricting the conditions under which women should be permitted to work in these words (pgs. 326-7):

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. * * *
>
> Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men, and could not be sustained.

Historically, the Supreme Court has used one of two tests to determine whether a state law offends the equal protection clause. In the first, the "reasonableness" or "rational basis" test, the Court asks two questions: did the state have a constitutionally permissible purpose in passing the law, and is the classification employed in the law used reasonably to further that purpose? If any state of facts can be conceived that would sustain the law, then the existence of that state of facts must be assumed and the person who is challenging the law carries the burden of showing it does not rest on a reasonable basis, but is instead arbitrary.

The second, or "strict judicial scrutiny" test, is invoked when the Court has determined that the classification employed in the law is "suspect," or that a fundamental right is affected by the classification.[5] In this test, the Court asks: did the state have a purpose of overriding or compelling public importance in passing the law, and is the classification established by the law necessary to accomplish that purpose? When the "strict scrutiny" test is used, the facts necessary to sustain the law will not be assumed and must be demonstrated. In addition, the state bears the burden of proof on whether the chosen classification is necessary and whether less drastic alternatives are unavailable. For all these reasons, the plaintiff has a much better chance of successfully challenging an allegedly discriminatory state law if the Court can be

4. It is interesting to note that in the immediately following Supreme Court cases upholding state protective laws, a woman was among the complainants in only one of them. Bosley v. McLaughlin, 236 U.S. 385, 35 S.Ct. 345 (1915). Furthermore, the Court did not apply Muller to minimum wages for women on the ground it was the right of an employer and employee to negotiate a bargain without state interference. Adkins v. Childrens Hospital, 261 U.S. 525, 43 S.Ct. 394 (1923). In 1937, however, a minimum-wage law for women in the state of Washington was upheld. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 57 S.Ct. 578.

5. Among court-defined fundamental rights are voting and interstate travel. Education, at this time, is not. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278 (1973), reh. den'd. 411 U.S. 959, 93 S.Ct. 1919 (1973).

persuaded to use the "strict scrutiny" test.

In 1948, the Supreme Court applied the "rational basis" test to uphold a Michigan law prohibiting women (except the wife or daughter of the male owner of a licensed liquor establishment) from working as bartenders. Goesaert v. Cleary, 335 U.S. 464, 69 S.Ct. 198.

Writing for the majority with a mellow but patronizing detachment,[6] Justice Frankfurter said (pg. 199):

> We are, to be sure, dealing with a historic calling. We meet the alewife, sprightly and ribald, in Shakespeare, but centuries before him she played a role in the social life of England.

And then, getting down to the business at hand, Frankfurter continued:

> While Michigan may deny to all women opportunities for bartending, Michigan cannot play favorites among women without rhyme or reason. The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of the law. * * * Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature.[7] (Emphasis supplied.)

But times (and sexual stereotypes) change, and in 1971 the California Supreme Court, in Sail'er Inn, Inc. v. Kirby, 485 P.2d 529, invalidated a state bartending law similar to the one upheld in Goesaert--because sex, the California Supreme Court said, was a suspect classification and therefore strict scrutiny was required. Then, a few months after Sail'er Inn, the U.S. Supreme Court, in Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971), struck down for the first time another state law on the ground it discriminated against women.

The law in question was a provision of the Idaho Code giving a preference to men over women when persons of the same statutory entitlement class applied to a probate court for letters of administration. In rejecting the argument that the elimination of an extra probate court hearing on the issue of who should be appointed--the man or the woman--justified the classification by gender, the Court said (pg. 254):

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment * * *.

While Reed did not go so far as to declare sex to be a suspect classification, requiring strict or close judicial scrutiny, it nevertheless moved away from the former "rational basis" test, under which a justification such as "administrative convenience" would have been sufficient to sustain the challenged Idaho system of

6. In Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L. Rev. 675 (1971), Johnston and Knapp, characterizing themselves as middle-aged, white males, said (pg. 676): "Our conclusion, independently reached, but completely shared, is that by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable."

7. Significantly, the three dissenting justices did not challenge the majority's contention that complete exclusion of women from bartending would be valid. Rather, they dissented because the exception operated in favor of female relatives of male owners but did not extend to daughters of a female owner, or to the female owner herself.

classification. In effect, the Court adopted a third test somewhere between the two-tiered approach of "rational basis" and "strict scrutiny."

In 1973, however, a plurality of the Court did declare sex a suspect classification and applied the "strict scrutiny" test to the military-benefits law,[8] invalidating a requirement (justified by the government solely on the grounds of administrative convenience) that women in the military prove their husbands' dependency in order to get medical and housing benefits when military men received such benefits automatically for their wives. Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764 (1973)

But a plurality is not a majority, and it is therefore important to examine the positions of the individual justices in Frontiero. Brennan wrote the plurality opinion and was joined by Douglas, White, and Marshall. Stewart wrote a cryptic one-sentence concurring opinion, in which he said that the classification system chosen worked "an invidious discrimination in violation of the Constitution." (Presumably, he was less than enchanted with the plurality's conclusion that "strict scrutiny" was required.)

More significantly, Powell, Burger, and Blackmun, though also concurring in the judgment, objected to a categorizing of sex classifications as inherently suspect at a time when the Equal Rights Amendment was in the ratification process, since the ERA, if adopted, would resolve (they said) that very question. Neither of the three is therefore likely to join the plurality in the immediate future, and it seems just as unlikely that Stewart and Rehnquist (the only dissenter) will be so inclined.

The frailness of the plurality was demonstrated a year thereafter when Douglas departed from it to write the majority opinion in Kahn v. Shevin, 416 U.S. 351, 94 S.Ct. 1734 (1974), a case upholding a Florida statute that gave widows a five-hundred-dollar property-tax exemption but denied the same exemption to widowers. Douglas, after noting that the job market was inhospitable to the woman seeking any but the lowest-paying job, and that this disparity was likely to be greater for a widow, distinguished Kahn in this fashion (pg. 1737):

> This is not a case like Frontiero v. Richardson * * * where the Government denied its female employees both substantive and procedural benefits granted males "solely for administrative convenience." * * * We deal here with a State tax law reasonably designed to further the State policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden.

Two months after Kahn, the Court decided Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974), upholding, as against a challenge on equal protection grounds, a provision of California's disability insurance program which exempted from coverage any work loss resulting from normal pregnancy.[9]

8. Because the challenge was to the federal government, not to a state, the case was decided under the due process clause of the Fifth Amendment. Since 1954 the Court has recognized that a principle comparable to the explicit Fourteenth Amendment guarantee of equal protection is implicit in the Fifth Amendment's due process clause.

9. Footnote 20 in Aiello raises a question as to whether the Court, when it eventually confronts a Title VII case involving an employer's policy for dealing with disability payments for time lost because of pregnancy, will rule, as so many lower courts have ruled in Title VII cases, that discrimination based on pregnancy is discrimination based on sex. Footnote 20 is discussed in a subsequent appendix dealing with maternity and pregnancy.

The evidence showed the disability insurance system was funded entirely by contributions deducted from the wages of participating employees at a rate of one percent of an employee's salary up to an annual maximum of $85. The Court, clearly impressed by the fact that the program had been totally self-supporting since its inception, and that income each year was usually approximately equal to expenses, discussed the alleged invidious discrimination under the equal protection clause in these words (pg. 2491-2):

> The classification challenged in this case relates to the asserted under-inclusiveness of the set of risks that the State has selected to insure. Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contribution exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." * * * Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point * * *.
>
> * * * The State has a legitimate interest in maintaining the self-supporting nature of its insurance program. Similarly, it has an interest in distributing the available resources in such a way as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately. Finally, California has a legitimate concern in maintaining the contribution rate at a level that will not unduly burden participating employees, particularly low-income employees who may be most in need of the disability insurance.
>
> These policies provide an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has.[10]

In early 1975, the Court decided Schlesinger v. Ballard, ___ U.S. ___, 95 S.Ct. 572, a case superficially resembling Frontiero. Ballard, a male navy officer, had challenged provisions in the United States Code to the effect that a male line officer passed over twice for promotion was subject to mandatory discharge, while women line officers were allowed 13 years of commissioned service before being subject to such discharge. Ballard himself, facing mandatory discharge after only nine years' service, alleged the law discriminated on the basis of sex in a manner prohibited by the Constitution and the rulings in Reed and Frontiero.

The Court disagreed. In both Reed and Frontiero, it said, the challenged classifications based on sex were not only made for reasons of administrative convenience but were also premised on overbroad generalizations which could not be tolerated under the Constitution. In Reed, it continued, the assumption was that men would generally be better estate administrators than women; in Frontiero, the assumption was that female spouses of servicemen would normally be dependent upon their husbands, while male spouses of servicewomen would not.

But male and female line officers in the Navy, the Court said, are not similarly situated with respect to opportunities for professional service, since, among other things, women line officers are not allowed to participate in combat and most sea duty. Thus Congress might quite rationally have believed, the Court reasoned, that women line officers had less opportunity for promotion than their male counterparts, and that a longer period of tenure for women line officers would therefore be consistent with the goal to provide them with equitable career advancement programs.[11]

10. Brennan, joined by Douglas and Marshall, dissented on the Frontiero ground that sex was a suspect classification and therefore strict judicial scrutiny was required.

11. Brennan, once more joined by Douglas and Marshall, again dissented on the basis of Frontiero. White agreed for the most part with Brennan's dissent, but he did not indicate the areas of that agreement.

In March, 1975, while this study was in preparation, the Court held, in Weinberger v. Wiesenfeld, 419 U.S. 822, 95 S.Ct. 1225, that the gender-based distinction mandated by the provisions of the Social Security Act, which grant survivors' benefits based on the earnings of a covered deceased husband and father both to his widow and to the couple's minor children in her care, but which grant benefits based on the earnings of a covered deceased wife and mother only to the minor children and not to the widower, violated the right to equal protection secured by the due process clause of the Fifth Amendment, since it unjustifiably discriminated against women wage earners required to pay social security taxes by affording less protection for their survivors than was provided for men wage earners.

Once more a majority of the Court carefully sidestepped an opportunity to decide whether sex was a suspect classification. A three-judge court, in 367 F. Supp. 981 (N. J. 1973), had determined that the challenged classification in the Social Security Act satisfied the traditional equal protection standard. But the court then held that sex was inherently suspect and that close judicial scrutiny was therefore required. Using this higher standard, the court found that the challenged classification violated the equal protection component of the Fifth Amendment.

In affirming,[12] the Supreme Court said the gender-based distinction was indistinguishable from that invalidated in Frontiero, where (and the Court quoted from Ballard) an archaic and overbroad generalization was made about the female spouses of servicemen and the male spouses of servicewomen. Wiesenfeld, it said, presented the same kind of archaic and overbroad generalization, namely, that male workers' earnings are vital to the support of their families, while earnings of female wage earners do not significantly contribute to their families' support.

The government, relying on Kahn, argued that a statute "reasonably designed to further the * * * state policy of cushioning the financial impact of spousal loss upon that sex for whom that loss imposes a disproportionately heavy burden" could survive an equal protection attack. To this the Court replied (pg. 1233):

> But the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.

And in Footnote 16 to the opinion, Brennan said (pg. 1233):

> This Court need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation.

On April 15th, 1975, the Supreme Court decided Stanton v. Stanton, __ U.S. ___, 95 S.Ct. 1373, with this quiet aside (pg. 1377):

> We find it unnecessary in this case to decide whether a classification based on sex is inherently suspect.

Stanton involved a Utah statute extending the period of minority for males to 21 and for females to 18 years of age. It was held that the statute, in the context of child support, denied equal protection by establishing a gender-based classification having no rational relationship to the statutory objective, and that

12. Brennan, curiously enough, wrote the opinion, but in it no notice is taken of the three-judge court's rationale, namely, that sex was a suspect classification.

a divorced mother had standing to challenge the statute's constitutionality when her former husband refused to pay child support for their daughter after she reached the age of 18. The support issue, it was also said, was not moot simply because the daughter was now over 21, since if the husband was actually obligated by the divorce decree to pay support for his daughter between the ages of 18 and 21, there was now an amount owing and past due.

The decision was based on Reed. Notwithstanding old notions, the Court said, that it was man's primary responsibility to provide a home and that it was therefore salutary for him to have an education before he assumed the responsibility, the fact remained that (pg. 1378):

> A child, male or female, is still a child * * *. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.[13]

STATE ACTION

In sex discrimination cases, as in other equal protection cases, the equal protection clause is not a shield against private conduct, no matter how discriminatory or wrongful. Rather, it is a shield against state action.

But the courts determine the degree of state involvement necessary to invoke the equal protection clause almost on a case-by-case basis. In Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856 (1961), for example, where there was found to be "state action" when a privately owned restaurant on premises leased from a Delaware statutory agency and located in a state-owned off-street parking building followed a practice of excluding blacks, the Court said (pg. 860):

> (T)o fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an "impossible task" which "this Court has never attempted." * * * Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.

In U.S. v. Guest, 383 U.S. 745, 86 S.Ct. 1170 (1966), the Court, after noting that the equal protection clause adds nothing to the rights one citizen has against another, said (pg. 1177), "This is not to say, however, that the involvement of the State need be either exclusive or direct."

Cases in subsequent appendices will note situations in which the courts have considered the problem of

13. The mother's victory was somewhat Pyrrhic. The Court remanded the case for a determination of when the father's obligation for support, pursuant to the divorce decree, terminated under Utah law. The mother had asserted that, with the classification eliminated, the common law applied, and that at common law the age of majority for both males and females was 21. The father had claimed that any unconstitutional inequality between males and females should be remedied by treating males as adults at 18, rather than by withholding the privileges of adulthood from women until they reached 21.

state action when sex discrimination has been alleged.[14]

A developing line of cases has also begun to invoke the concept of "state action" within the meaning of the equal protection clause to challenge state grants of tax exemption to an organization that discriminates on racial grounds in its admission or membership policies. Pitts v. Department of Revenue, 333 F. Supp. 662 (E. D. Wisc. 1971); Falkenstein v. Department of Revenue, 350 F. Supp. 887 (Or. 1972).

A related line of cases has invoked Fifth Amendment guarantees in similar situations. Thus, in Green v. Connally, 330 F. Supp. 1150 (D.C. 1971), aff'd. mem. sub nom. Coit v. Green, 404 U.S. 997, 92 S.Ct. 564 (1971), the lower court said that the Internal Revenue Code could no longer be construed so as to provide private schools operating on a racially discriminatory premise the support of exemptions and deductions federal tax law affords to charitable organizations and their sponsors. In McGlotten v. Connally, 338 F. Supp. 448 (D.C. 1972), a three-judge court ruled that federal approval of a fraternal organization's receipt of tax-deductible contributions held forth a duty to insure compliance with Fifth Amendment prohibitions against racial discrimination. And in Bob Jones University v. Simon, 416 U.S. 725, 94 S.Ct. 2038 (1974), the plaintiff failed in an effort to restrain the Internal Revenue Service from revoking a tax-exemption ruling letter issued because the university did not admit blacks as students.

SUMMARY

The paternalistic approach of Muller and the patronizing approach of Goesaert, in which the Court would, if necessary, supply a rationale for a legislative classification based on gender, have given way to a quasi-skeptical approach in which the Court looks beneath the surface to test not only the purpose of the legislative classification but also the assumptions on which it is based.

This is not to say, however, the Court's scrutiny in equal protection cases alleging sex discrimination will be "strict" or "close." The Frontiero plurality of 1973 would like to apply that kind of scrutiny, but a majority clearly opposes such an approach. Three members of that majority oppose even confronting the issue of whether sex is a suspect classification while the ERA is in the ratification process, and in the cases decided since Frontiero it is evident there has been a certain amount of accommodation to their viewpoint.

14. In cases involving the suspension of students by private universities, it has been held that mere incorporation or the granting of a tax exemption (but see succeeding paragraphs of the main text on this point) does not "so insinuate" the state into the affairs of the university as to constitute state action. Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969). In Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968), where disciplinary action was also the issue, state action was not established simply because (1) the university received a large proportion of its income from public funds, (2) it received other government benefits, such as a lease of city land to build a gymnasium, and (3) it performed a public function by educating people. As to the public funds, 80% came from the federal, not the state government, and the mere receipt of funds from the state, the district court said, was not itself sufficient to make the recipient an agent of the state. Otherwise, all kinds of contractors and enterprises, increasingly dependent on government business, would find themselves charged with state action.

For example, Wiesenfeld, decided below on the ground sex was a suspect classification and therefore strict scrutiny was required, was affirmed with noticeable silence on the point. Instead, the Court called upon the "archaic and overbroad" concept enunciated in Ballard.

The adoption of a third standard for review in sex discrimination cases brought under the equal protection clause began with Reed in 1971, where Burger, speaking for a unanimous Court, said a classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

The practical result of the Court's movement toward a standard of review more demanding than the traditional "rational basis" is beneficial to all plaintiffs in sex discrimination cases brought on equal protection grounds. The burdens of proof have changed, and Reed, Frontiero, Wiesenfeld, and Stanton prove such cases can now be won. But as Kahn, Aiello, and Ballard show, they can also be lost. The next great change will come if, as, and when a majority of the Court finds sex to be a suspect classification.

APPENDIX A-1

EQUAL PROTECTION SUPPLEMENT--THE POST-CIVIL WAR

CIVIL RIGHTS ACTS: 42 U.S.C.A. SECTIONS 1981, 1983, 1985(3)

42 U.S.C.A. Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C.A. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C.A. Section 1985(3) provides in part:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this Section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

With respect to the three Civil Rights acts above, the courts have agreed:

1. The Acts have not been repealed by implication or by legislation such as Title VII of the Civil Rights Act of 1964 which deal with the same subject matter. Johnson v. Cincinnati, 450 F.2d 796 (6th Cir. 1971); Parmer v. National Cash Register Co., 346 F. Supp. 1043 (S.D. Ohio 1972).

2. Relief may be pursued concurrently and in conjunction with Title VII. Young v. International Telephone and Telegraph Company, 438 F.2d 757 (3rd Cir. 1971).

3. State procedures need not be exhausted before bringing suit under these laws. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473 (1961).

4. The courts will apply the appropriate state Statute of Limitations. Green v. McDonnell Douglas Corporation, 463 F.2d 337 (8th Cir. 1972), rev'd and remanded on other grounds, 411 U.S. 792, 93 S.Ct. 1817 (1973).

5. Back pay, reinstatement, and injunctive relief are available as remedies. Johnson v. Cincinnati, supra; Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), cert. den'd., 401 U.S. 948, 91 S.Ct. 935 (1971).

SECTION 1981

As to Section 1981, a number of circuit courts have held that it prohibits private employment discrimination on the basis of race. Youmg v. International Telephone and Telegraph Co., 438 F.2d 757 (3rd Cir. 1971). However, most courts that have considered the issue of whether Section 1981 prohibits employment discrimination based on sex have concluded it does not. League of Academic Women v. Regents of University of California, 343 F. Supp. 636

(N.D. Cal. 1972); Williams v. San Francisco United School District, 340 F. Supp. 438 (N.D. Cal. 1972).

Notwithstanding these cases, the argument is made in Sex Discrimination and Section 1981, Spring 1973 Women's Rights Law Reporter 2, that the section is a broad remedial statute implementing the full scope of the Thirteenth Amendment, and that though the Thirteenth Amendment had its origins in the movement to abolish slavery, it is directed toward more than race discrimination. The article suggests the term "white citizens" should be construed as the standard against which disparate treatment is to be measured, not as a restriction on protection afforded. Noting that the courts have held Section 1981 to protect many classes of persons besides blacks--such as aliens, corporations, students, taxpayers, and whites in the company of blacks--the article concludes that this established liberal approach requires that the statute be applied in the same fashion to protect the employment rights of women.

SECTION 1983

In Section 1983 cases involving sex discrimination, there are usually two threshold issues: one, is the defendant a "person" within the meaning of the statute, and two, has the defendant been acting "under color of" state law?[1]

As to the first threshold question, for example, it has been held school districts are persons within the meaning of Section 1983.[2] But some courts, though recognizing school districts as "persons" for purposes of equitable relief, extend immunity with respect to money damages.[3] A good example of this dichotomy appears in Seaman v. Spring Lake Park Independent School District, 363 F. Supp. 944, (Minn. 1973), and Seaman v. Spring Lake Park Independent School District, 387 F. Supp. 1168 (1974). In the first Seaman, the Court granted a preliminary injunction against a school district in the Section 1983 proceeding. In the second, it said the school district was not subject to liability for attorney's fees and payment of sick leave.[4] Even in the second Seaman case, however, it was said the superintendent and individual members of the board of education could be held liable for the relief being sought.

The award of back pay, however, is generally considered to be equitable in nature insofar as this dichotomy is concerned. Thus, in Paxman v. Wilkerson, 390 F. Supp. 442 (E.D. Va. 1975), it was said that while a defense

1. The "under color" of law provision in Section 1983 is the same as state action under the Fourteenth Amendment. United States v. Price, 383 U.S. 787, 86 S.Ct. 1152, 1157, n.7. (1966).

2. See Brenden v. Independent School District, 342 F. Supp. 1224, 1229 (Minn. 1972), aff'd 477 F.2d 1292 (8th Cir. 1973); Butts v. Dallas Independent School District, 436 F.2d 728, 729 (5th Cir. 1971).

3. See Butts, last footnote.

4. This concept of nonliability derives from Monroe v. Pape, supra, where the Supreme Court said the municipality of Chicago was not a "person" within the meaning of Section 1983 for purposes of an action for damages because of alleged unlawful acts by police officers. Courts that apply Monroe to school districts do so because of their quasimunicipal nature. For a discussion of why Monroe does not apply to school districts when only equitable relief is sought in a Section 1983 proceeding, see Harkless v. Sweeny Independent School District, 427 F.2d 319, 321-323 (5th Cir. 1970).

of immunity from damages had clearly been incorporated into Section 1983 doctrine, the defense did not apply to claims for back pay, which were an integral part of the equitable remedy of reinstatement.

On the more fundamental question of whether such a dichotomy is proper at all, the Supreme Court has recently said that, regardless of whether the relief sought is damages or equitable relief, a municipal corporation is not a "person" within the meaning of Section 1983. City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507, 93 S.Ct. 2222 (1973). To the extent, therefore, state law makes school districts something in the nature of a municipal corporation, Kenosha would mean they are not "persons" within Section 1983. Exactly this conclusion was reached, as to Texas, in Sterzing v. Fort Bend Independent School District, 496 F.2d 92 (5th Cir. 1974), and as to Florida, in Adkins v. Duval County School Board, 511 F.2d 690 (5th Cir. 1975). And relying in part on Kenosha, a three-judge court held, in Lopez v. Williams, 372 F. Supp. 1279 (S.D. Ohio 1973), that a city board of education, as a political subdivision of the state, was not a "person." To the same effect, and apparently relying on Kenosha, the Court, in Huntley v. North Carolina State Board of Education, 493 F.2d 1016 (4th Cir. 1974), said a state board of education was not a "person" within the meaning of Section 1983.

On the other hand, it was said without discussion in Aurora Education Association East v. Board of Education of Aurora Public School District No. 131 of Kane County, Illinois, 490 F.2d 431 (7th Cir. 1973), cert. den'd. 416 U.S. 985, 94 S.Ct. 2388 (1974), that a local board of education was not a municipal corporation and thus was not outside the coverage, at least on that particular ground, of Section 1983. Furthermore, the Supreme Court, in addition to denying certiorari in Aurora, has decided many cases in which equitable relief against a school board was sought under Section 1983, without discussion of whether the board was a "person" within the ambit of Section 1983.[5]

As to the second threshold requirement, the plaintiff must show the defendant acted "under color of law,"[6] which phrase has consistently been treated as being the same as the "state action" required under the Fourteenth Amendment.[7] The concept of "state action" was briefly discussed in the equal protection appendix, and Section 1983 cases dealing with the same concept will be discussed in later appendices.

SECTION 1985(3)

In Griffin v. Breckenridge, 403 U.S. 88, 91 S.Ct. 1790 (1971), the Court held that Section 1985(3) does not require "state action" for its successful invocation against private conspiracies aimed at invidiously discriminatory deprivation of the equal rights secured to all by law. The Court also said that a complaint, to state a cause of action under Section 1985(3), must allege that the defendants (pg. 1798):

> * * * did (1) "conspire or go in disguise on the highway or on the premises of another" (2) "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws." It must then assert that one or more of the conspirators (3) did,

5. See, for example, Raney v. Board of Education, 391 U.S. 443, 88 S.Ct. 1697 (1968).

6. Adickes v. S. H. Kress and Co., 398 U.S. 144, 90 S.Ct. 1598, 1604 (1970).

7. U.S. v. Price, 383 U.S. 787, 86 S.Ct. 1152, 1157, n.7. (1966).

> or caused to be done "any acts in furtherance of the object of the conspiracy," whereby another was (4a) "injured in his person or property" or (4b) "deprived of having and exercising any right or privilege of a citizen of the United States."

Later in the opinion, the Court said (pg. 1798):

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.

Griffin involved racial bias, and on pg. 1798, n.9, the Court expressly reserved the question of whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable. In Pendrell v. Chatham College, ___ F. Supp. ___, 9 FEP Cases 10 (W.D. Penn. 1974), however, it was held that Section 1985(3) could support a cause of action for sex discrimination, since the section drew its validity equally from the Fourteenth and Thirteenth Amendment. Though the Thirteenth Amendment was applicable only to discrimination against black persons, its restrictiveness, the district court said, was overborne by the all-inclusive effect of the equal protection clause of the Fourteenth Amendment.[8] And in Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Penn. 1974), it was held that alleged sex discrimination by a university and some of its employees was in fact a conspiracy and not a single act of discrimination by a single business entity, and that Section 1985(3) reached invidious conspiracies based on gender.

Seemingly contra as to the "conspiracy" question is Cole v. University of Hartford, ___ F. Supp. ___, 10 FEP Cases 477 (Conn. 1975), where it was held the absence of allegations that two university officials acted other than in the normal course of their university duties required dismissal of a Section 1985(3) action by a black former employee who claimed the university and the two officials conspired to engage in racially discriminatory hiring practices, since the university and its officials constituted a single entity which could not conspire with itself.

SUMMARY

As to Section 1981, the weight of authority seems to be to the effect it will not support an action for sex discrimination.

As to Section 1983, it will support an action for denial of rights under the equal protection clause,[9] including a denial resulting from sex discrimination. However, the plaintiff must establish the defendant acted "under color of law," that is, that there was "state action" in the sense contemplated by the Fourteenth Amendment. Such instances will be noted in some of the Section 1983 cases discussed in subsequent appendices.

There is confusion among lower courts as to whether a school district is a "person" within the meaning of Section 1983, but the better and more recent law would seem to be a school district is such a person (unless Kenosha, supra, is applicable).

In Section 1985(3) actions involving conspiracies aimed at invidiously discriminatory deprivation of the rights secured to all by law, it is not necessary to establish the defendant acted under color of law, but the Supreme Court has not yet ruled on whether this section creates a cause of action against sex-based discrimination.

8. See also Pendrell v. Chatham College, 370 F. Supp. 494 (W.D. Penn. 1974).

9. Shock v. Tester, 405 F.2d 852 (8th Cir. 1969), cert. den'd. 394 U.S. 1020, 89 S.Ct. 1641 (1969), rehearing den'd. 395 U.S. 941, 89 S.Ct. 2004 (1969).

APPENDIX B

EXCERPTS FROM TITLE VII

OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (42 U.S.C.A. 2000e, et seq.), provides in part as follows:

§ 2000e

(b) The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person * * *. (Title VII, § 701)

§ 2000e-2

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's * * * sex * * * or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's * * * sex * * *.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his * * * sex, * * * or to classify or refer for employment any individual on the basis of his * * * sex * * *.

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his * * * sex * * * in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, * * * or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his * * * sex * * * in those certain instances where * * * sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise * * *.

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, * * * or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of * * * sex, * * * nor shall it be an unlawful practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of * * * sex * * *. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(j) Nothing contained in this subchapter shall be interpreted to require any employer * * * to grant preferential treatment to any individual or to any group because of the * * * sex * * * of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any * * * sex * * * employed by any employer * * * or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such * * * sex * * * in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (Title VII, § 703)

§ 2000e-3

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

(b) It shall be an unlawful employment practice for an employer, * * * employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or publish or cause to be printed or published any notice or advertisement relating to employment by such an employer * * *, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee, indicating any preference, limitation, specification, or discrimination, based on * * * sex, * * * except that such a notice or advertisement may indicate a preference, limitation, specification, or discrimination based on * * * sex * * * when * * * sex * * * is a bona fide occupational qualification for employment. (Title VII, § 704)

§ 2000e-7

Nothing in the subchapter shall be deemed to exempt or relieve any person from any liability * * * provided by any present or future law of any State * * *, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter. (Title VII, § 708)

ADDENDUM EXCERPT FROM TITLE XI, CIVIL RIGHTS ACT OF 1964

§ 2000h-4

Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof. (Title XI, § 1104)

APPENDIX C

GENERAL CONSIDERATION OF TITLE VII

PROHIBITIONS ON SEX DISCRIMINATION IN EMPLOYMENT

INTRODUCTION

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, is aimed at discrimination in employment (with exceptions outside the scope of this study) when that discrimination is based on race, color, religion, sex, or national origin.

In addition, Title VII creates the Equal Employment Opportunity Commission (hereafter referred to in this and subsequent appendices as the EEOC), which, by the 1972 amendments, acquired subpoena and court-enforcement powers, thus significantly strengthening its existing conciliation and investigative functions. Furthermore, aggrieved individuals, by filing charges with the EEOC within 180 days after the alleged unlawful employment practice occurred (different rules apply when a complaint was made first to a state agency) and by receiving and acting in timely fashion upon the EEOC's statutory notice of a right to sue, may also undertake court action.

If a court, in turn, finds that an employer has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, it may enjoin the employer from engaging in the unlawful practice, and order such affirmative relief as may be appropriate, which may include, but is not limited to, reinstatement or hiring with or without back pay, or any other equitable relief it deems appropriate. Back pay, however, is not allowed for more than two years prior to the filing of a charge with the EEOC, and certain setoffs related to interim earnings, or amounts earnable with reasonable diligence, are permitted. In its discretion, the court may also allow the prevailing party--other than the EEOC or the United States--a reasonable attorney's fee.

Title VII of the Civil Rights Act of 1964 contained a specific exemption for educational institutions. That exemption (except in narrow circumstances not considered here) was removed by the Equal Employment Opportunity Act of 1972. As a consequence, educational institutions otherwise meeting the definition of an "employer," as set out in Section 701(b) (42 U.S.C.A. Section 2000e (b)),[1] are now subject to the requirements of Title VII. This being so, the following cases should be considered in a reference-frame which applies the derived principles to the educational environment, because a court decision about employment discrimination in a factory or business enterprise such as a department store will more often than not be applicable to educational institutions (notwithstanding the fact educational institutions have problems unique to their own environment). By the same token, such of the following cases as involve racial discrimination are generally applicable to sexual discrimination, and the appropriate analogy should be drawn.

1. See Appendix B.

This appendix will deal with cases that enunciate general principles applicable to Title VII's prohibition on sex discrimination in employment. Subsequent appendices will deal with specific problem areas, such as hiring, maternity leave, fringe benefits, and so on. Since cases dealing with general principles also involve specific problem areas, and cases dealing with specific problem areas sometimes involve general principles, there will be occasions, as between this and later appendices, when there are either gaps or overlaps in coverage. Users are requested to make the appropriate correlations.

ENTRY TO TITLE VII--THE "NEUTRAL RULE" CONCEPT

It is convenient, for purposes of classification, to speak of discrimination (sexual or otherwise) as facial or facially neutral. The simplest example of facial discrimination based on sex occurs when an employer refuses to hire an applicant simply because the applicant is female. But if this same employer states that anyone who can run the hundred-yard dash in ten seconds will be hired, say, as a bank clerk, this seemingly neutral rule--if one assumes for the moment that most men can run the hundred-yard dash faster than most women and that speed in running has nothing to do with the job performance of a bank clerk--results in facially neutral discrimination against women. In practice, of course, neutral rules are not as absurd or patently discriminatory as the one given in the example.

The leading case on the subject is Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971). The plaintiffs, who were blacks, challenged several of the defendant employer's hiring and transfer rules, one of which required new employees to have a high-school education as well as to pass two aptitude tests in order to be assigned to certain more desirable departments. The evidence showed that white employees hired before the requirement was put into effect and who had not completed high school or taken the aptitude tests had continued to perform satisfactorily in those departments. In upholding the challenge, the Court said (pg. 853-4):

> Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.
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> The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.
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> (G)ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability.[2] (Emphasis supplied.)

2. The employer contended the aptitude tests were permitted by Section 703(h) (See Appendix B), which authorizes the use of "any professionally developed ability test" that is not "designed, intended or used to discriminate because of race * * *." The EEOC has issued guidelines interpreting this section to permit only the use of job-related tests, and the Court, in upholding the guidelines as expressive of the will of Congress, said (pg. 854-5), "The administrative interpretation of the Act by the enforcing agency is entitled to great deference."

What the Court said in Griggs with respect to blacks is, of course, equally applicable to women. Practices neutral on their face, and even neutral in terms of intent, cannot be maintained if they freeze the status quo of prior discriminatory practices--unless they can be justified by business necessity.

The concept of business necessity was analyzed in Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573 (1971), at page 798:

> (T)he applicable test is not merely whether there exists a business purpose for adhering to a challenged practice. The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out this purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the purpose advanced, or accomplish it equally well with a lesser differential racial impact.

Recently this test of "business necessity," i.e., that there must exist an overriding business purpose such that the practice is necessary to the safe and efficient operation of the business, was applied in a case of alleged sex discrimination, Palmer v. General Mills, Inc., ___ F.2d ___, 10 FEP Cases 465 (6th Cir. 1975), where it was said an employer's departmental seniority system perpetuated the effects of past sex discrimination in work assignments since (1) the system placed any woman considering transfer at a disadvantage when competing with men free to enter the same department before discrimination in work assignments had ended, and (2) the system was not essential (but rather, merely helpful) in providing training and experience for employees in the line of progression to better jobs.

The "neutral rule" concept was applied in Danner v. Phillips Petroleum Co., 447 F.2d 159, reh. den'd. 450 F.2d 881 (5th Cir. 1971), to uphold an allegation of sex discrimination in the discharge of a female employee with ten years' experience during a company economy drive. Notwithstanding the ten years service, she had no seniority, bidding, or "bumping" rights, because Phillips had a policy of not giving such rights to clerical employees since their jobs were not "unionized."

Phillips, however, also had a policy of giving nonunion employees who held unionized jobs the same benefits they would have had if they had been members of the union. The trouble with this superficially neutral rule was, only the jobs of utility men and roughnecks were "unionized," meaning, in practical effect, only men holding these jobs (not available to women) possessed seniority, bidding, or bumping rights. All this led the Court to say (pg. 163):

> A "policy" to limit company privileges to only one class of employees and to exclude others cannot survive in the name of "company policy" alone if the net effect of that policy is to exclude all women.[3]

Since the decision in Griggs, the courts have carefully examined the validation procedures for tests used

3. In Local 53 of Int. Ass'n of Heat and Frost I. and A. Wkrs. v. Vogler, 407 F.2d 1047 (5th Cir. 1969), a union's apparently neutral membership provision, which excluded persons not related to present members by blood or marriage, was held invalid, since its effect in an all-white union was to bar Negroes and Mexican-Americans.

by employers in hiring, promotion, and transfer practices to see if the tests are actually related to job performance. For example, in United States v. Georgia Power Company, 474 F.2d 906 (5th Cir. 1973), where aptitude and intelligence tests used by the employer had come under attack because they excluded from employment disproportionately more blacks than whites, the employer tried to defend their validity by introducing statistical data to prove a relationship between the test scores and job performance. Some of this data consisted of comparisons made between test scores of existing employees and their job ratings as given by supervisors. The sample was small and the study excluded the 40 percent of the applicants who had failed the tests. In holding the validation study was not sufficient to carry the employer's burden of proof on the question of performance-relatedness, the Court said (pg. 914):

> Perhaps the most absolute bar to the action of the court below in accepting the work done by Dr. Hite as a final validation * * * is the absence of any attempt to show that the tests did not screen out blacks as blacks. This minimum is designed to safeguard the key guarantee which the guidelines and the Act intend to assure--that the benefit of employment is not denied to blacks by the apparent neutrality of a facially objective ability test. (Emphasis supplied).

Similarly, in Walston v. County School Board of Nansemond County, Virginia, 492 F.2d 919 (4th Cir. 1974), a school board's seemingly neutral rule requiring teachers to take the National Teachers Examinations and obtain a certain minimum score was invalidated when evidence showed that the testing requirement had resulted in the elimination of more black teachers than white teachers and that the test did not purport to measure classroom teaching skills.[4]

In Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972), a seemingly neutral promotion procedure was invalidated when it appeared the recommendation of an employee's immediate superior was the indispensable single most important factor in the promotion process, immediate superiors were given no written instructions pertaining to the qualifications necessary for promotion, the standards which were determined to be controlling were vague and subjective, and there were no safeguards to avert discriminatory practices.[5]

In another promotion case in which a seemingly neutral rule was criticized, Marquez v. Omaha District Sales Office, Ford Division, 440 F.2d 1157 (8th Cir. 1971), it appeared the employer had a policy of requiring prior training in Class 7 or 8 field experience in order for an employee to advance to a Class 9 managerial position. The plaintiff, a Mexican-American who had held a Class 6 job for many years, charged Ford with discrimination in failing to give him a Class 9 position as manager of the department in which he was then working. Nationwide, however, it was Ford's policy never to advance an employee from a Class 6 to a Class 9 position, and the trial court had therefore viewed Ford's failure to advance Marquez as being based solely on "business necessity."

4. A promotional system dependent upon supervisory recommendation uncontrolled by clearly delineated and objective job criteria and which resulted in discriminatory job standards was patently illegal under Title VII, according to Baxter v. Savannah Sugar Refining Corporation, 495 F.2d 437 (5th Cir. 1974).

5. For a case in which there was held to be no discrimination even though an initial interviewer had plenary power to reject an applicant after the applicant, in the actual case a Mexican-American, had passed a preliminary written test, see Ochoa v. Monsanto Co., 335 F. Supp. 53 (S.D. Tex. 1971), aff'd. per curiam, 473 F.2d 318 (5th Cir. 1973).

The appellate court accepted this evidentiary premise, even viewing the promotional policy as neutral on its face and nondiscriminatory, but it nevertheless rejected the conclusion that Marquez was not discriminated against in the application of the policy. Commenting on its rejection, the Court said (pgs. 1159-60):

> It is true that the Civil Rights Act of 1964 is not violated where an employer's present system of promotion excludes consideration of an employee because he is deemed not qualified solely by reason of lack of ability or experience. However, where an employer's present advancement policy serves to perpetuate the effects of past discrimination, although neutral on its face, it rejuvenates the past discrimination in both fact and law regardless of present good faith.

Since Griggs, too, educational and experience requirements imposed by employers have come under scrutiny (when they are seemingly discriminatory and not demonstrably related to job performance). Thus, in Roman v. Reynolds Metals Co., 368 F. Supp. 47 (S.D. Tex. 1973), where a Mexican-American challenged an employer's requirement of a high-school diploma for every position, it was said, in language far broader than the facts of the case, that an educational requirement had to be job related or else a bona fide business necessity, and further, that the requirement was objectionable if imposed merely to maintain a high quality of personnel or to ease advancement.

On the other hand, in Spurlock v. United Air Lines, Inc., 475 F.2d 216 (10th Cir. 1972), it was said that where an airline's flight officers underwent a rigorous training program on being hired and then were required to attend intensive refresher courses to remain at peak performance ability, the possession of a college degree indicated the applicant had the ability to understand and retain concepts given in the atmosphere of a classroom or training program, and where a person with a college degree, particularly in the "hard" sciences, was more apt to cope with the initial training program and refresher courses, the requirement of a college degree was a lawful employment standard, notwithstanding it might have inherently discriminated against black applicants. It was also said that where a job required a high degree of skill and the economic risks involved in hiring an unqualified applicant were great, the employer did not bear as heavy a burden to show its employment criteria were job related as when the amount of skill and training and the consequences of hiring an unqualified applicant were insignificant.

All this, of course, raises large, as yet unanswered questions concerning the requirement for a Ph.D. for certain academic positions if the requirement results in discrimination against women who previously could not get into some areas of graduate study because of sex quotas.

3. BONA FIDE OCCUPATIONAL QUALIFICATION EXCEPTION

Not all facial sex discrimination in employment is unlawful. Section 703(e) of Title VII[6] provides it shall not be an unlawful employment practice for an employer to hire employees on the basis of sex where

6. See Appendix B.

"sex * * * is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

In the debate in the House of Representatives before passage of Title VII, Representative Goodell cited as an example of a bona fide occupational qualification (hereafter referred to in this and subsequent appendices as the BFOQ) an elderly woman in a nursing home who might desire a female nurse. And the EEOC guidelines, taking the position the exception should be interpreted narrowly, mention authenticity as a justification for a BFOQ, i.e., the need for a male actor to play a male role, or a female actress to play a female role. Obviously, too, occupations such as wet nurse or semen donor, where a physical characteristic unique to one sex is necessary, would meet the BFOQ standards, as would certain jobs based on the norms of privacy (male attendant for a men's restroom, female attendant for a women's restroom). But once more, actual court cases involve more subtle BFOQ distinctions.

One of these distinctions--the Weeks test--is fundamental and will be considered in this appendix. Other, narrower BFOQ distinctions will be separately treated in the next appendix.

The Weeks Test: "All or Substantially All"

In the leading case of Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969), a woman who had been a Southern Bell employee for many years brought a Title VII action because the company refused to consider her application for the position of switchman.

From the evidence, it was clear she had been denied the job solely because she was female, not because she lacked any qualifications as an individual. The job sometimes required the lifting of items of equipment weighing in excess of 30 pounds, and Southern Bell felt this and similar aspects of the job made it too strenuous for women. It argued the job was therefore within the BFOQ exception.

The Court, citing with approval certain EEOC guidelines rejecting the application of the BFOQ exception to the refusal to hire a woman because of assumptions about the comparative employment characteristics of women in general or to the refusal to hire an individual based on stereotyped characterizations of the sexes, said (pgs. 235-6):

> We conclude that the principle of nondiscrimination requires that we hold that in order to rely on the bona fide occupational qualification exception an employer has the burden of proving that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved.
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> Southern Bell * * * would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 pounds, while all men are treated as if they can.[7] (Emphasis supplied.)

In order to invoke the BFOQ exception, therefore, it is not enough to show that most women would not be able to perform the particular job. It must be shown there is a factual basis for believing that all or substantially all women would not be able to perform it.

7. The burden of proving an exception to a humanitarian remedial statute is on the party claiming the exemption. Weeks, supra, and Phillips Inc. v. Walling, 324 U.S. 490, 65 S.Ct. 807 (1945).

The difficulty this burden places on the employer was demonstrated in Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754 (M.D. Ala. 1969)--another case in which a female telephone-company employee was denied the opportunity to bid on a job the company felt was too demanding for women.

The parties engaged in a battle of medical experts in an effort to establish significant differences between the ability of men and women to perform the job in question, and the Court, noting that this and other evidence made it clear it was rational, rather than merely capricious, to discriminate against women as a class in filling the position, nevertheless said the employer had not met its burden of proof in the manner required by Weeks. It had not shown, in short, there was a factual basis for believing that all or substantially all women could not meet the job's demands. And even granting that the nature of the job was such that the employer could legitimately exclude pregnant women from consideration, it could not exclude all women simply because some might become pregnant.

Some six months after the Fifth Circuit's decision in Weeks, supra, the Seventh Circuit, in Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969), considered an employer's rule which allowed men to bid for jobs on a plant-wide basis while women were restricted to bidding for jobs that did not require their lifting more than 35 pounds.

The trial court had felt that the employer acted reasonably in the interest of the safety of female employees, and that the rule was therefore a valid BFOQ exception. The Seventh Circuit disagreed. While the employer could, it said, retain a 35-pound weight-lifting limit as a guideline for all employees, male and female, individual employees had to be afforded a reasonable opportunity to demonstrate their individual ability to perform more strenuous jobs on a regular basis.

THE SEX-PLUS FACTOR

Two months after its decision in Weeks, supra, the Fifth Circuit, in Phillips v. Martin Marietta Corporation, 411 F.2d 1 (1969), opened the door to an interpretation of Title VII many women's rights advocates felt created an exception so large it would swallow the rule.

Mrs. Phillips, the plaintiff, had submitted an application for employment--in response to a newspaper ad--as an assembly trainee. She was told, however, that female applicants with "pre-school age children" were not being considered. There was no similar restriction on male applicants with "pre-school age" children, and Mrs. Phillips commenced a Title VII action.

Martin Marietta chose not to rely on the BFOQ exception, but to defend instead on the premise its policy of not hiring women with pre-school age children was not per se discrimination on the basis of "sex," since not all women were excluded from consideration. It was able to show, in fact, that 75 to 80 percent of those who applied for and of those who held the position of assembly trainee actually were women. The Circuit Court accepted this argument, saying (pg. 4):

> The evidence presented in the trial court is quite convincing that no discrimination against women as a whole or the appellant individually was practiced by Martin Marietta. The

> discrimination was based on a two-pronged qualification, i.e., a woman with pre-school age children. Ida Phillips was not refused employment because she was a woman nor because she had pre-school age children. It is the coalescence of these two elements that denied her the position she desired.

On a petition for rehearing, 416 F.2d 1257 (1969), Judge Brown, in a much quoted dissent, criticized that majority opinion and coined the phrase "sex-plus" to characterize the argument it embodied. Judge Brown said (pgs. 1259-60):

> The case is simple. A woman with pre-school children may not be employed, a man with pre-school children may. * * * Is this sex-related? To the simple query the answer is just as simple: Nobody--and this includes Judges, Solomonic or life tenured--has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.
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> It is the fact of the person being a mother--i.e., a woman--not the age of the children, which denies employment opportunity to a woman which is open to a man.
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> * * *
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> If "sex-plus" stands the Act is dead. * * * Free to add non-sex factors, the rankest sort of discrimination against women can be worked by employers.

Judge Brown must have felt vindicated when the Supreme Court, in Phillips v. Martin Marietta Corporation, 400 U.S. 542, 91 S.Ct. 496 (1971), vacated the decision in 411 F.2d 1, supra. As a result, the concept of the sex-plus factor is generally considered dead. It should be noted, however, the Supreme Court kept the case itself alive by remanding it for the taking of evidence on the question of whether the existence of conflicting family obligations among women and men with pre-school age children, if demonstrably more relevant to job performance for a woman than for a man, could arguably be the basis for a BFOQ exception.[8]

STATISTICS

An effort to use employment statistics to establish discrimination is common to many Title VII cases, for "statistics often tell much, and Courts listen."[9]

In Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), a Title VII case involving racial discrimination in hiring, the plaintiff introduced evidence to show the proportion of nonwhite employees had decreased from 1.86 percent in September, 1964, to 1.71 percent in June of 1966. Of the 54 black employees, six women had obtained positions in the office and clerical section, four of them becoming telephone operators. Most of the blacks, however, remained in the house service category. No blacks worked as craftsmen, draftswomen, or in sales. The Court, taking judicial notice of the 1960 census, to the effect the population of

8. The parties reached a settlement and the hearing ordered on remand was never held. Justice Marshall, separately concurring, criticized the Court's suggestion that a "bona fide occupational qualification reasonably necessary to the normal operation" of Martin Marietta's business could be established by a showing that some women, even the vast majority, with pre-school age children have family responsibilities which interfere with job performance, and that men do not usually have such responsibilities.

9. Alabama v. United States, 304 F.2d 583, 586 (5th Cir. 1962), aff'd. per curiam 371 U.S. 37, 83 S.Ct. 145 (1962).

Arkansas, where the case arose, was 21.9% black, held that the statistics established a violation of Title VII as a matter of law.

In Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir. 1975), it was said statistical evidence showing that only two of 3,129 claims adjusters hired between July 1, 1965 and March 17, 1972 were women, that during the same period 98.84 percent of all persons hired as claims representatives were women, and that the defendant itself had found one-third of its claims representatives were qualified to become claims adjusters, established a prima facie case of sex discrimination, thus shifting to the defendant the burden of showing the statistics were misleading or of showing nondiscriminatory reasons for its policy. [In the lower court proceedings, 372 F. Supp. 1146 (W.D. Penn. 1974), aff'd. in other areas, 511 F.2d 199 (1975), it was said conclusory statements that the employer had never discriminated in hiring were i sufficient to satisfy this burden.]

In Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Penn. 1973), the plaintiff, an untenured female assistant professor who alleged she was about to be discharged because of her sex, introduced statistical evidence to show that out of 401 faculty members in the school of medicine, where she was employed, only five women had tenure; that six departments had no women at all, eleven had no tenured women, and only three had women with tenure; that the average salary for male tenured professors was $37,500 while the average for women with tenure was $27,000, that increases in salary were granted at a higher rate to male professors; that there were four times as many women eligible for tenure as men; and that during the last six years, seventy men were given tenure as compared to three women.

The Court found the statistics persuasive, saying (pg. 1008):

> We agree that the statistics and other evidence of discrimination showing the imbalance of men and women with tenure in the School of Medicine and the Department of Biochemistry in particular make out a prima facie case which imposes upon the defendant the duty to go forward with rebutting evidence. * * * We do not necessarily have to agree with Dr. Gerald Gardner that the probability of no discrimination shown in these figures is one chance in 400 million but we would agree that the chances are very small.

A different result was reached in Green v. Board of Regents of Texas Tech University, 335 F. Supp. 249 (N.D. Tex. 1971), aff'd. 474 F.2d 594 (5th Cir. 1973), reh. den'd. 475 F.2d 1404, a 42 U.S.C.A. Section 1983 case[10] in which a female associate professor seeking redress for grievances allegedly resulting from sex discrimination by university officials, produced statistical evidence to support allegations of a pattern of discrimination against women in the hiring, salary, and promotion practices of her academic department. But unlike the situation in Johnson, the defendant came forward with overwhelming evidence showing the decision not to promote the plaintiff was based entirely on considerations other than sex.

In Rowe v. General Motors Corporation, 457 F.2d 348 (5th Cir. 1972), a racial discrimination action, the statistical evidence showed, among other things, that out of a total of 114 employees promoted from hourly jobs to salaried jobs between 1963 and 1967, only seven were blacks.

In discussing the weight to be given to such evidence, the Court said that while figures of this kind

10. See Appendix A-1.

do not necessarily satisfy the whole case, they have critical, if not decisive, significance--at least in putting on the employer the burden of demonstrating why, on acceptable reasons, the apparent disparity was not a real one.

The female plaintiff in Cupples v. Transport Insurance Co., 371 F. Supp. 146 (N.D. Tex. 1974), aff'd. 498 F.2d 1091 (5th Cir. 1974), worked for an insurance company having a total of 90 employees in all departments. In alleging she had been discriminated against on the basis of sex, she said that she was the first female underwriter trainee the company had ever had, and that she obtained the job only as the result of complaints to superiors. Furthermore, she said, no other women had become underwriter trainees since that time. But in answer to her argument this was statistical evidence of discrimination and tokenism, the Court said in a footnote that while statistics can prove discrimination where there are several thousand employees, they have less probative value when the total number of employees is as low as 90.

When it has been proven there is low employment of women by a particular employer and statistics fail to establish discrimination, it may be because the plaintiff has failed to show there was a pool of qualified applicants. Thus, in Stone v. E.D.S. Federal Corp., ___ F. Supp. ___, 5 FEP Cases 924 (N.D. Cal. 1973), the plaintiff, alleging the defendant had refused to hire her as a systems engineer because of her sex, produced evidence to show that only five percent of the defendant's several hundred systems engineers were women. In refusing to hold this necessarily established discrimination, the Court said there had been no evidence to show the pool of available and qualified applicants had any different composition. Though census figures indicated that the proportion of women in occupations such as computer specialists, computer programmers, and computer systems analysts was about twenty percent for each category, none of these categories, it was said, described the kind of systems engineers employed by the defendant, all of whom were required to have more precise skills and experience.

On the other hand, an employer cannot refute statistical evidence of discrimination by showing that no women applied, especially since the employer's reputation for discrimination might have had a "chilling" effect on inquiries. Lea v. Cone Mills, 301 F. Supp. 97 (M.D.N.C. 1969); Cypress v. Newport News General and Nonsectarian Hospital Assn., 375 F.2d 648 (4th Cir. 1967).

BURDEN OF PROOF[11]

The leading case is McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973).[12] The respondent, a black civil rights activist, engaged in disruptive and illegal activity against McDonnell as part of his protest that his discharge as an employee and the firm's general hiring practices were racially motivated. When McDonnell, which subsequently advertised for qualified personnel, rejected his re-employment

11. This burden of proof should be distinguished from that cited in Footnote 7, supra.

12. Edwin L. Wiegand v. Jurinko, 414 U.S. 970, 94 S.Ct. 293 (1973), vacating 477 F.2d 1038 (3rd Cir. 1973), indicates the same proof burdens are applicable to sex discrimination cases.

application on the ground of the illegal activity, he initiated the present suit, claiming the refusal to rehire was a subterfuge to disguise the fact he was denied employment because of his civil rights activities and his race. In this context, the Court discussed the applicable rules as to the burden of proof and how it shifts: (pgs. 1824-5):

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. * * *
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> The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination.
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> (B)ut the inquiry must not end here. While Title VII does not, without more, compel rehiring of respondent, neither does it permit petitioner to use respondent's conduct as a pretext for the sort of discrimination prohibited by Section 703(a)(1). On remand, respondent must * * * be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext. Especially relevant to such a showing would be evidence that white employees involved in acts against petitioner of comparable seriousness to the "stall-in" were nevertheless retained or rehired. * * *
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> Other evidence that may be relevant to any showing of pretext includes facts as to the petitioner's treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment.[13]

BACK PAY

Whether back pay should be awarded at all in a case of discrimination in employment under Title VII is a matter of the trial judge's discretion, and after a decision to award it has been made, the formula of computation and the determination of the recipients are also matters within his discretion. Thornton v. East Texas Motor Freight, 497 F.2d 416 (6th Cir. 1974).

Where back pay is asked in an action based on sex discrimination in employment, a court must balance the various equities between the parties and decide upon a result which is consistent with the purposes of Title VII and fundamental concepts of fairness. Schaeffer v. San Diego Yellow Cabs, Inc., 462 F.2d 1002 (9th Cir. 1972).

Thus, in LeBlanc v. Southern Bell Telephone and Telegraph Co., 333 F. Supp. 602 (E.D. La. 1971), aff'd. 460 F.2d 1228 (5th Cir. 1972), cert. den'd. 409 U.S. 990, 93 S.Ct. 320 (1972), the Court, while declaring invalid certain state protective laws limiting the number of hours per day or per week that women could work, declined to award back pay against the employer who, in good faith but in incorrect reliance on their validity, had discriminated against women by denying them access to certain jobs, and who, in states where there were no

13. In McDonnell, it was also said that the absence of an EEOC finding of "reasonable cause" could not bar suit under Title VII, and that court actions under Title VII are de novo proceedings.

such laws, had given women access to these same jobs.[14]

The award of back pay, in short, is not punitive in nature, but is equitable, and is intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination. Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573 (1971).

Back pay also includes more than straight salary. It includes interest, overtime, shift differentials, and vacation and sick pay. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, reh. den'd. 494 F.2d 1296 (5th Cir. 1974).

In Meadows v. Ford Motor Co., 510 F.2d 939 (6th Cir. 1975), it appeared the trial court had found discrimination in hiring as to the female plaintiff and her class. Accordingly, it awarded attorney's fees and ordered the defendant to create a special hiring pool consisting of the plaintiff and members of her class, in a selection priority determined by the dates each had applied for work, and to call each individually for a job interview as opportunities arose in a proportion of one to three as compared with its general hiring pool. But the trial court refused to award back pay, saying, in substance, that back pay could generally be awarded only in cases of discrimination involving promotion, transfer, or firing, and in a few instances of hiring where it was definitely shown an individual would have been entitled to employment (but for the discrimination) on a date certain. In the present case, it said, there was no way to determine who would have been hired, and when, and what other circumstances might have intervened.

The Sixth Circuit disagreed. Back pay, it said, was awardable in hiring discrimination, even if the determination was difficult. Furthermore, it was also appropriate to grant retroactive seniority, although such a grant would not depend solely upon the existence of a record sufficient to justify back pay but would also involve consideration of the interests of workers who might be displaced as well as the interests of the employer in retaining an experienced work force. In addition, other fringe benefits such as pension rights and choice of vacation schedules should be retroactively awarded to the date found to be appropriate for the award of back pay.

OTHER EQUITABLE RELIEF

Under Title VII, the courts are possessed of broad discretionary power to fashion remedies which prevent future discrimination and remedy the effects of past discrimination, Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971), and the provision in Title VII that a Court may enjoin and order such affirmative action as may be appropriate is to be broadly read and applied so as to effectively terminate discriminatory employment

14. To like effect is Kober v. Westinghouse Electric Corporation, 480 F.2d 240 (3rd Cir. 1973), but contra is Schaeffer, supra, where a female employee was awarded back pay for the extra hour per day which male employees but not female employees were permitted to work from the date when the employer had knowledge of both a court decision invalidating a state maximum-hours law and the EEOC's decision in favor of the employee.

practices and make victims whole. Chastang v. Flynn & Emrick Co., 365 F. Supp. 957 (Md. 1973).

Where, for example, an employer had maintained blatantly discriminatory policies for over five years after the passage of Title VII and had since that time moved toward complying with its mandates only under pressure from government agencies and in the face of threatened litigation, a district court should retain jurisdiction against the employer for at least two years, and should require periodic reports which would enable the court to ascertain that the remedial measures mandated by it were being carried into effect. Franks v. Bowman Transportation Company, 495 F.2d 398 reh. den'd. 500 F.2d 1184 (5th Cir. 1974), on appeal.

Thus, where there was a likelihood an employee would prevail on the merits of her charge she was terminated from employment in violation of Title VII, a preliminary injunction was granted ordering the employer to reinstate her to her former position and to give her the pay she otherwise would have received from the date of her discharge until her reinstatement. EEOC v. Liberty Mutual Insurance Co., 346 F. Supp. 675 (N.D. Ga. 1972), aff'd and remanded on other grounds 475 F.2d 579 (5th Cir. 1973), cert. den'd. 414 U.S. 854, 94 S.Ct. 152 (1973).

With respect to the language of Section 706(g) of Title VII, which provides for equitable relief if a court finds that a defendant "has intentionally engaged in or is intentionally engaging in" an unlawful employment practice, defendants have sometimes contended this language requires the plaintiff to prove the existence of a discriminatory intent. But the courts have said the language requires only that the defendant meant to do what it did, that is, that its employment practice was not accidental. Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971), cert. dismissed 404 U.S. 1006, 92 S.Ct. 573 (1971).

SUMMARY

The underlying philosophy of Title VII, emphasized again and again by the courts, is that traditional stereotypes about women as a class are not to be and must not be applied to individual members of the class. Each woman has the right to an individualized appraisal of her abilities and capabilities.

She also has the right to choose to do that which the culture has historically considered unsuitable for women. Or, as was said in Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969), in response to the argument a particular job was unsuitable for women because, among other things, those who held it sometimes had to respond to midnight emergency calls (pg. 236):

> Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.

Under Title VII, employment practices neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory practices. And if an employment practice that operates to exclude women cannot be shown to be related to job performance, the practice is prohibited. But to all this there is an exception--the exception of "business necessity." That is, does there exist an overriding legitimate business purpose such that the practice is necessary to the safe and efficient conduct of the business?

Under these "neutral rule" standards, where an employer's present system of promotion serves to perpetuate the effects of past discrimination, the system, although neutral on its face, rejuvenates the past discrimination regardless of present good faith. And under these same standards, generalized, undefined, or subjective promotion (or hiring) practices are suspect.

Title VII also recognizes that some jobs are such that the sex of the applicant or employee is a bona fide occupational qualification for effective performance of that job. But employers cannot establish arbitrary distinctions in this area. If an employer wishes to exclude women from a particular job, it must carry the burden of showing it has reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties involved.

In addition, an employer cannot avoid the imperatives of Title VII by uniting sex with a second factor (the so-called "sex-plus factor") to exclude women from a particular job. Accordingly, the argument that refusal to hire women with pre-school age children is not discrimination based on sex, but rather discrimination based on the coalescence of sex and a second factor of having pre-school age children, fails as a defense--unless the employer can establish the coalescence itself is a BFOQ.

In Title VII (and other) cases of alleged sex discrimination, statistics often play a vital role. They can be used to make a prima facie case, thus requiring the employer to carry the burden of justifying the apparent discrimination on legally acceptable grounds. But conclusory statements by the employer that it had never discriminated are not sufficient to meet this burden. In a case that is not a class action, however, this burden can be met by a showing that the plaintiff herself was not hired (or promoted) because of consideration unrelated to sex (even though discrimination against women as a class might have been proven).

When the employing institution is small, statistics lose some of their probative value. And when statistics fail to establish discrimination, it is sometimes because the plaintiff has failed to show the existence of a pool of qualified applicants--that is, failed to show that the pool of qualified applicants has a male-female ratio different from that which the offered statistics have shown to be characteristic of the particular employer's practices.

In Title VII cases, the plaintiff must carry the initial burden of establishing a prima facie case. Then the burden shifts to the employer to show some legitimate, nondiscriminatory justification for the practice. When the employer does this, the burden shifts to the plaintiff to show the justification is pretextual.

Back pay, in Title VII cases, is not intended to be punitive. Its allowance is discretionary, as are the formula of computation and the determination of recipients. A court, in short, must balance the equities between the parties, and where, for example, an employer has relied in good faith on state protective laws prohibiting the employment of women in certain jobs, back pay will not ordinarily be allowed.

Overall, the courts have broad discretionary authority to fashion the proper remedy. They can require affirmative action by the employer, they can retain jurisdiction over an extended period, and they can order reinstatement of the plaintiff even at the time they grant a preliminary injunction--if it is likely the plaintiff will prevail on the merits. And they do not have to find a specific discriminatory intent on the part of the employer. It is only necessary that the employer meant to do what it did, that is, that its employment practice was *not* accidental.

APPENDIX D

SEX DISCRIMINATION IN EMPLOYMENT--HIRING, PROMOTION, TRANSFER

Hiring, promotion, and transfer are treated together here because in general similar principles are applied to problems in each of these areas.

The first part of this appendix continues with an examination of the BFOQ exception begun in the previous appendix, except that here the focus is on specific areas of application, namely, customer or similar preferences, marital status, state protective laws, and physical characteristics or capabilities. At the heart of all of them is the concept, set out in the legislative history[1] and EEOC regulations,[2] and uniformly endorsed by the courts,[3] that the BFOQ exception must be interpreted narrowly.

The second part of this appendix then considers cases involving hiring, promotion, and transfer, but not necessarily involving the BFOQ exception.

PART I

CUSTOMER AND SIMILAR PREFERENCES

In Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), cert. den'd. 404 U.S. 950, 92 S.Ct. 275 (1971), the plaintiff had been denied a job as a flight cabin attendant by Pan Am because the airline hired only females for the job. At the trial, Pan Am tried to meet the Weeks rule[4] by presenting psychiatric testimony to the effect that an airplane cabin represented a unique environment in which the carrier had to take account of the special psychological needs of its passengers, and that these needs were far better attended to by females. On a parallel track, it presented evidence that its passengers overwhelmingly preferred to be served by female flight attendants, and it argued that the single-sex requirement was, in the words of the BFOQ exception in Section 703(e) of Title VII,[5] "reasonably necessary to the normal operation" of its business.

In rejecting this argument, the Fifth Circuit said (pg. 388):

> We begin with the proposition that the use of the word "necessary" in section 703(e) requires that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively.

1. Interpretative memorandum by Senators Clark and Chase, floor managers of the bill. 110 Cong. Rec. 7213 (1964). See also H. R. Rep. No. 914, 88th Cong., 1st Sess. (1963).
2. 29 CFR Sec. 1604.2(a).
3. For example, Kober v. Westinghouse Electric Corp; 325 F. Supp. 467, 469 (W.D. Penn. 1971), aff'd. 480 F.2d 240 (3rd Cir. 1973).
4. See Appendix C.
5. 42 U.S.C.A. 2000e-2(e). See Appendix B.

> The primary function of an airline is to transport passengers safely from one point to another. While a pleasant environment, enhanced by the obvious cosmetic effect that female stewardesses provide as well as, according to the finding of the trial court, their apparent ability to perform the non-mechanical functions of the job in a more effective manner than most men, may all be important, they are tangential to the essence of the business involved. * * *
>
> We do not mean to imply, of course, that Pan Am cannot take into consideration the ability of individuals to perform the non-mechanical functions of the job. What we hold is that because the non-mechanical aspects of the job of flight cabin attendant are not "reasonably necessary to the normal operation" of Pan Am's business, Pan Am cannot exclude all males simply because most males may not perform adequately.

To Pan Am's argument its passengers preferred female cabin attendants, the Court cited with approval EEOC guidelines to the effect a BFOQ ought not to be based on "the refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers,"[6] and then said (pg. 389):

> While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.[7]

STATE PROTECTIVE LAWS

In dealing with the argument that state protective laws restricting, for example, the number of hours women can work per day, or the maximum weight they can be allowed to lift, create a BFOQ, or otherwise justify an exception to the mandates of Title VII, courts have had to give consideration to Section 708[8] and also Section 1104 of Title XI.[9] In substance, the former purports to exempt from liability a person who disobeys a state law requiring the doing of an act which would be an unlawful employment practice under Title VII; the latter provides that no part of the Civil Rights Act of 1964 shall be construed as indicating an intent of Congress to occupy the field the Act covers to the exclusion of state laws on the same subject, and that no part of the Act shall be construed as invalidating any provision of a state law unless the provision is inconsistent with the purposes of the Act.

In Utility Workers Union v. Southern California Edison Co., 320 F. Supp. 1262 (C.D. Cal. 1970), the defendand argued that the "saving" clauses of the two sections cited above reflected a congressional intent to leave state protective legislation intact and that the clauses would be rendered meaningless if they did not do so. But the Court rejected this argument in its entirety. The purpose of the sections, it said, was simply that of ensuring

6. 29 CFR 1604.2(a) (iii).

7. After reversal and remand, further proceedings were had in Diaz v. Pan American World Airways, Inc., 346 F. Supp. 1301 (S.D. Fla. 1972), and 348 F. Supp. 1083. Pan Am was ordered to pay all males who would have been hired at the time of their initial application except for their sex and who accepted Pan Am's offers of employment and satisfactorily completed the training program and probationary period for flight cabin attendants the back pay they could have been expected to earn, with certain adjustments. The second case vacated the final judgment in 346 F. Supp. 1301 for procedural reasons not material here and provided for the conditional entry of a new judgment.

8. 42 U.S.C.A. Sec. 2000e-7. See Appendix B.

9. 42 U.S.C.A. Sec. 2000h-4. See Appendix B.

the preservation of state laws that paralleled Title VII in prohibiting employment discrimination, and not that of protecting conflicts. To the same effect is LeBlanc v. Southern Bell Telephone and Telegraph Co., 333 F. Supp. 602 (E.D. La. 1971), aff'd. 460 F.2d 1228 (5th Cir. 1972), cert. den'd. 409 U.S. 990, 93 S.Ct. 320 (1972).

When the courts confront state protective legislation which conflicts with the prohibitions on sex discrimination in Title VII, they face the difficult decision of whether to invalidate the offending state law, or to extend it to the excluded sex.[10] Another difficult question is, who should bear the cost of the discrimination perpetuated by such laws? Women argue that they have lost money because of the protective legislation, but through no fault of their own, and that therefore they should be reimbursed. But employers argue they should not have to pay back wages because they were caught, but through no fault of their own, between conflicting federal and state requirements. (In LeBlanc, supra, where the employer's good-faith reliance on a state protective law was shown, this exculpatory argument was approved, and back pay was not allowed.)

With this by the way of background, it is appropriate to consider the leading cases dealing with conflicts between Title VII and state protective laws.

In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), the plaintiff alleged her employer had discriminated solely because of her sex by assigning the position of agent-telegrapher to a junior male employee after she had applied for it. The job occasionally required work in excess of ten hours a day and eighty hours a week (it was this opportunity to earn overtime, in fact, that made the position attractive to the plaintiff) and the lifting of heavy objects. But because this type of overtime and lifting conflicted with restrictions imposed on women by California labor laws and regulations, and therefore only males could work at the agent-telegrapher job without being in violation of them, the company argued that the restrictions made maleness a BFOQ. In disapproving this approach, the Court said (pg. 1225):

> This argument assumes that Congress, having established by Title VII the policy that individuals must be judged as individuals, and not on the basis of characteristics generally attributed to racial, religious, or sex groups, was willing for this policy to be thwarted by state legislation to the contrary.

Furthermore, the Court said, it was implicit in certain EEOC guidelines[11] that state labor laws inconsistent with the objectives of Title VII must be disregarded, and on these premises it upheld the lower court's judgment that the restrictions in the California Labor Code did not create a BFOQ and that they were invalid insofar as they were in conflict with Title VII.[12]

10. The same problem can arise in equal protection cases when a statute unconstitutionally differentiates between men and women. See Harlan's lengthy discussion of the problem in Welsh v. United States, 398 U.S. 333, 90 S.Ct. 1792, 1798 (1970), a case involving a federal statute dealing with conscientious objectors.

11. 29 CFR Section 1604.2(b).

12. To like effect are: Ridinger v. General Motors Corporation, 325 F. Supp. 1089 (S.D. Ohio 1971), rev'd and remanded on other grounds 474 F.2d 949 (6th Cir. 1973) (prohibition of female employment in certain occupations, weights, hours, required rest periods); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304 (S.D. Ill. 1970) (hours); Richards v. Griffith Rubber Mills, 300 F. Supp. 338 (Ore. 1969) (weights); Kober v. Westinghouse Electric Corporation, 325 F. Supp. 467 (W.D. Penn. 1971), aff'd. 480 F.2d 240 (3rd Cir. 1973) (hours); Manning v. General Motors Corp., ___ F. Supp. ___, 3 FEP Cases 969 (N.D. Ohio 1971), aff'd. sub nom Manning v. International Union, 466 F.2d 812 (6th Cir. 1972), cert. den'd. 410 U.S. 946, 93 S.Ct. 1366 (1973)(working conditions, hours, prohibited employment); General Electric Co. v. Hughes, 454 F.2d 730 (6th Cir. 1972) (weights, hours).

And in Jones Metal Products Co. v. Walker, 281 N.E.2d 1 (Ohio 1972), the Ohio Supreme Court held invalid, as against employers subject to Title VII, state statutes requiring employers to provide seats, lunchroom facilities, and meal periods for female employees, and compelling employers to refuse to employ a female at specified occupations or in excess of a specified number of hours.

Extension, not invalidation, of protective legislation was the outcome in Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972). An employer sought an adjudication that an Arkansas statute requiring women to be paid time and one-half for all hours worked in excess of eight per day discriminated against men and therefore had to be invalidated to the extent it conflicted with Title VII.

The Court, however, held that any such conflict could be avoided by requiring the employer to pay male employees the same premium overtime rate it was compelled to pay women[13] and distinguished cases that invalidated state protective laws (such as Rosenfeld, supra) on the ground such laws completely prohibited the employment of all members of one sex in certain occupations. It would place an unreasonable burden on employers to require them to extend the "benefits" of such protective laws to both sexes, because then no one could work in these occupations. But in the present case, no such unreasonable burden would be imposed by extending the "benefits" of the Arkansas statute to male employees. The Court then quoted with approval the language of the lower court in Potlatch Forests, Inc. v. Hays, 318 F. Supp. 1368 (E.D. Ark. 1970), at page 1375:

> The financial burden this placed upon Potlatch may seem onerous, but federal labor legislation enacted over the last thirty odd years has placed many onerous burdens on employers. It is open to Arkansas employers generally to seek repeal of Act 191 of 1915. It is open to Potlatch as an individual employer to rearrange its working schedules so that nobody works more than eight hours a day until all employees have worked their first forty hours in a workweek.

Homemakers, Inc. of Los Angeles v. Division of Industrial Welfare, 356 F. Supp. 1111 (N.D. Cal. 1973), aff'd. ___ F.2d ___, 10 FEP Cases 633 (9th Cir. 1974), presented an "extension" issue nearly identical to the one resolved by the Eighth Circuit in Potlatch. An employer of domestic workers and of persons who cared for the sick in patients' homes sought to have certain California statutes and regulations requiring overtime premium pay only for female employees declared invalid. The employer had been refusing to pay the overtime premium on the ground that to do so would be a violation of Title VII. The Division of Industrial Welfare contended the employer could bring itself into compliance with Title VII by simply extending the same overtime premium to men. In reply, the Court said (pg. 1112-3):

> Such an interpretation would constitute usurpation of the legislative power that has been vested exclusively in the state Legislature. The Court is aware that the only authority directly on this issue is contrary. (Here the Court briefly discusses the two Potlatch cases, supra).
>
> * * *
>
> * * * Defendants urge the Court to make this change, however, referring to EEOC guidelines which say an employer will be adjudged in violation of Title VII if it refuses to

13. To reach this result, the Court relied in part on a provision of the Equal Pay Act (discussed in a later appendix) which requires an employer paying an unlawful wage rate differential not, in order to comply with the law, to reduce the wage rate of any employee, and in part on EEOC guidelines in 29 CFR Section 1604.2, which declare, with respect to state laws requiring minimum wage and premium pay for overtime for female employees, that it is an unlawful employment practice for an employer not to provide the same benefits for male employees.

> hire female employees to avoid payment of overtime or if it fails to provide the same benefits for its male employees. * * *
>
> The Court agrees that great deference should be given EEOC guidelines and interpretative comments, because the EEOC is charged with the responsibility of enforcing the Civil Rights Act of 1964. * * * But the authorization given the EEOC by Congress is to issue procedural regulations. Such authority does not include regulations which would affect substantive state law to the degree urged here, namely that of adding a new class of beneficiaries to those already covered by the California statutes requiring overtime payments to women. Such a substantial change in legislative intent should be made by the legislature, not the courts.[14, 15]

MARITAL STATUS

In Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), cert. den'd. 404 U.S. 991, 92 S.Ct. 536 (1971), the plaintiff, a United stewardess, had been discharged for violating a company policy which required that stewardesses must be unmarried. No such policies applied to male flight cabin attendants.

In finding discrimination, and that the no-marriage rule was not a BFOQ for the position held by stewardesses, the Court said (pg. 1199):

> United has failed to offer any salient rationale in support of its marital status policy. The only reason specifically addressed to that rule is that United was led to impose the requirement after it received complaints from husbands about their wives' working schedules and the irregularity of their working hours. This is clearly insufficient. Section 703(e)(1) specifically requires the correlation between the condition of employment and satisfactory performance of the employee's occupational duties. The complaints of spouses do not suffice as an indicator of employee confidence. Moreover, by its very terms, the narrow exception in Section 703(e)(1) calls for employers to treat their employees as individuals. United's blanket prophylactic rule prohibiting marriage unjustifiably punishes a large class of prospective, otherwise qualified and competent employees where an individualized response could adequately dispose of any real employment conflicts.[16, 17] (Emphasis supplied.)

In Gerstle v. Continental Air Lines, Inc., 358 F. Supp. 545 (Col. 1973), two ex-stewardesses brought a Title VII action against Continental, alleging they had resigned their jobs upon their marriages because of Continental's rule requiring that all stewardesses be single. There was no BFOQ question in the case, because Continental contended they had resigned because of their marriages, irrespective of the rule requiring stewardesses to be single.

14. A year earlier in Burns v. Rohr Corporation, 346 F. Supp. 994 (S.D. Cal. 1972), another California district court chose invalidation over extension as to a regulation of the California Industrial Welfare Commission requiring certain rest breaks to be given to women but not to men. (The defendant also unsuccessfully argued that the regulation established a BFOQ within the meaning of Title VII.)

15. In Mengelkoch v. Industrial Welfare Commission, 442 F.2d 1119, (9th Cir. 1971), it was held that female employees challenging a California statute limiting the number of hours women could be employed in certain establishments on constitutional grounds were presenting a question sufficiently substantial to be heard by a three-judge court, notwithstanding they were also challenging the statute on Title VII grounds. Ward v. Luttrell, 292 F. Supp. 162 (E.D. La. 1968), is contra to Mengelkoch on the appropriateness, in a similar constitutional challenge, of convening a three-judge court.

16. The Court also approved an EEOC guideline stating that an employer's rule which restricted the employment of married women but was not applicable to married men was prohibited by Title VII. 29 CFR Section 1604.4(a).

17. In Lansdale v. Air Line Pilots Association International, 430 F.2d 1341 (5th Cir. 1970), a complaint alleging that a union caused an airline employer to permit male flight cabin attendants to marry while denying the same privilege to female attendants was held to state a claim under Title VII upon which relief could be granted.

This argument prevailed, the Court saying that even if the "no-marriage" policy did violate Title VII, that element alone was not sufficient to justify an immediate finding for the allegedly aggrieved plaintiffs. There had to be a demonstration by the required burden of proof that the policy was the cause of the claimed injuries, and the plaintiffs, the Court continued, had failed to demonstrate the "no-marriage" policy was the force behind their resignations, even with allowance being made for the theory the policy created a "constructive" discharge as of the time they married.

PHYSICAL CHARACTERISTICS AND CAPABILITIES

Aside from restrictions placed by state protective laws on the lifting of objects over a certain weight by women, many employers independently adhere to an equivalent policy, thus excluding women from a wide range of usually better-paying jobs. But employers have been generally unsuccessful in invoking the BFOQ exception to justify such weight-lifting limitations, which are frequently fixed at about thirty pounds--even though women are accustomed to handling this much weight and more when they care for children in infancy.

The defect in such a policy, in terms of Title VII, is that it depends on a stereotype about women as a class. Thus, in Weeks v. Southern Bell Telephone and Telegraph Co., 408 F.2d 228 (5th Cir. 1969), where the Court concluded Southern Bell had not satisfied its burden of proving that the job of a switchman was within the BFOQ exception, it was said (pgs. 235-6):

> They introduced no evidence concerning the lifting abilities of women. Rather, they would have us "assume," on the basis of a "stereotyped characterization" that few or no women can safely lift 30 lbs., while all men are treated as if they can. While one might accept, arguendo, that men are stronger on the average than women, it is not clear that any conclusions about relative lifting ability would follow. This is because it can be argued tenably that technique is as important as strength in determining lifting ability. Technique is hardly a function of sex. What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.

In Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971), it was said, with respect to work requiring not only the lifting of weights but the heavy physical effort involved in climbing over and around boxcars to adjust their vents, collapse their bunkers, and seal their doors, that (pg. 1225):

> The premise of Title VII * * * is that women are now to be on equal footing with men. * * * The footing is not equal if a male employee may be appointed to a particular position on a showing that he is physically qualified, but a female employee is denied an opportunity to demonstrate personal physical qualification. Equality of footing is established only if employees otherwise entitled to the position, whether male or female, are excluded only upon a showing of individual incapacity. * * * This alone accords with the Congressional purpose to eliminate subjective assumptions and traditional stereotyped conceptions regarding the physical ability of women to do particular work. (Emphasis supplied.)

And as was said in Weeks, supra, the burden of proof is on the employer to show that there is "reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."

In Long v. Sapp, 502 F.2d 34 (5th Cir. 1974), it was said that if a female making a claim of sex discrimination in employment challenges the assumed superior physical ability of her male counterpart to meet the job

requirements, objective testing is required.[18]

In Meadows v. Ford Motor Co., 62 F.R.D. 98 (W.D. Kent. 1973), remanded on other grounds, 510 F.2d 939 (6th Cir. 1975), the issue was not the weight the employee could lift, but the weight of the employee herself. It was held that the employer had violated Title VII by maintaining a policy requiring production workers to weigh a minimum of 150 pounds, where (1) 80 percent of all females from the ages of 18 to 24 in the United States could not meet this requirement whereas it could be met by 70 percent of all males in the same age bracket, (2) the employer had made exceptions for men weighing between 135 and 150 pounds but had made no exceptions for women, and (3) the employer had made no studies to determine the strength of people relative to their weight.[19, 20]

The question of whether an employer can invoke the BFOQ exception to require pregnant female employees to take mandatory maternity leaves at arbitrarily fixed times during pregnancy is considered in Appendix E, but it is noted here that in Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754 (M.D. Ala. 1969), it was said a telephone company could have a rule against pregnant women being considered for the position of commercial representative because of the strenuous nature of the work. And in deLaurier v. San Diego Unified School District, ___ F. Supp. ___, 10 FEP Cases 361 (S.D. Cal. 1974), it was said that where a school district had introduced medical evidence relating to the declining ability of women in the eighth month of pregnancy to perform certain work effectively and relating to doctors' miscalculations concerning the date of delivery, it had appropriately established that (1) the unique responsibilities of a school teacher required a four-week maternity leave policy, (2) the policy was justified by business necessity, and (3) the policy was a BFOQ.

PART II

In McDonald v. General Mills, Inc., 387 F. Supp. 24 (E.D. Cal. 1974), a female college student brought a Title VII action against employers which had allegedly engaged in sex discrimination in hiring when they interviewed at her college. The defendants, apparently relying on McDonnell Douglas Corporation v. Green, 411 U.S. 792, 93 S.Ct. 1817 (1973),[21] where the Supreme Court said a plaintiff in a Title VII trial should show, among other things, that he or she applied and was qualified for the job for which the employer was seeking applicants, moved to dismiss because the plaintiff had failed to allege she had actually applied for employment with the

18. In Footnote 5 to Weeks, supra, it was said: "It may be that where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with women on an individualized basis, it may apply a reasonable general rule."

19. Title VII was violated by an airline's imposing weight and height requirements only on stewardesses. Laffey v. Northwest Airlines, Inc., 374 F. Supp. 1382 (D.C. 1974).

20. In Smith v. City of East Cleveland, 363 F. Supp. 1131 (N.D. Ohio 1973), a case involving equal protection rather than Title VII, an ordinance requiring police officer applicants to be a minimum of 5'8" in height and to weigh a minimum of 150 pounds was held to discriminate unlawfully against women. The height requirement excluded 95 percent of all women (versus 46 percent for men) and the weight requirement excluded from 78 percent to 84 percent of all women (versus 28 percent for men), and neither was rationally related to the job performance of a police officer in East Cleveland.

21. See Appendix C.

defendants and been rejected. But the district court, pointing out that the facts and incidents necessary to make a prima facie case may vary, said it was sufficient for the plaintiff to allege she was deterred from making application and seeking an interview because the defendant had indicated an express preference for males.

In Cooper v. Allen, 467 F.2d 836 (5th Cir. 1972), it appeared that the plaintiff, a black who had applied for a job as a municipal golf pro, had failed a standard intelligence test the city administered routinely for some twenty job categories. In such a situation, the Fifth Circuit said, there was no requirement that prior to the implementation of an intelligence test as a hiring criterion, the employer must validate its ability to forecast job performance, but once a plaintiff showed a discriminatory effect from the test, the burden shifted to the defendant to prove its validity. Since the particular test was discriminatory, the plaintiff was entitled to back pay and injunctive relief unless the city could show he would not have been hired even absent the discriminatory testing requirement.

In Leisner v. New York Telephone Co., 358 F. Supp. 359 (S.D. N.Y. 1973), the plaintiffs were female employees who were attacking their employer's promotion policies on the management level. Among other nonvalidated promotion procedures criticized in the case because of their discriminatory effect relative to women were the giving of special weight to technical degrees, military experience, and prior supervisory experience when teaching was not included.

In Gillin v. Federal Paper Board Co., Inc., 479 F.2d 97 (2nd Cir. 1973), a male whom the evidence showed to be better qualified was appointed traffic manager, a position also sought by the female plaintiff. Notwithstanding that the male was better qualified, discrimination was found to exist because the employer refused to consider her for the position not simply because of her lack of qualification but because of her sex as well. Her immediate supervisor told her, in fact, the job "wasn't suitable for a woman."

In Baxter v. Savannah Sugar Refining Corporation, 495 F.2d 437 (5th Cir. 1974), it was said that a promotional system dependent upon supervisory recommendation uncontrolled by clearly delineated and objective job criteria and which resulted in discriminatory job standards was unlawful under Title VII.

In Pond v. Braniff Airways, Inc., 500 F.2d 161 (5th Cir. 1974), it was said that where an employer can demonstrate, with respect to selection or advancement of employees, that it weighed each person's talents in good faith and then chose the man over the woman (or the woman over the man), no case was made under Title VII. But the Court added this caveat (pg. 166):

> Courts must be extremely careful to determine that the reasons given for selecting a male applicant over a female applicant are not simply a ruse disguising true discrimination. Courts must further carefully scrutinize the employer's explanations for its conduct once the aggrieved employee has proved a prima facie case of discrimination. If the capacity or competency distinction upon which the employer's selection is based inheres in the nature of an employee as a man or a woman, or if the employer in any way permits stereotypical culturally-based concepts of the abilities of people who perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid. The line that must be drawn is a fine one--because interpreting an employer's motives on the basis of its actions is at times hazardous, especially when there exists potentially valid and seemingly plausible business explanations as to such actions which in fact mask a true intent to discriminate.

In Jurinko v. Edwin L. Wiegand Co., 477 F.2d 1038 (3rd Cir. 1973), vacated on other grounds, 414 U.S. 970, 94 S.Ct. 293 (1973), it was stated that hiring and promotion practices which varied in their applicability to married females and married males constituted discrimination on the basis of sex. But to make a case, a plaintiff must show that the men preferred over her were in fact marri[illegible]

In Fogg v. New England Telephone and Telegraph Co., 346 F. Supp. 645 (N.H. 1972), it was held that although the telephone company had discriminated against women in its promotion policy, the plaintiff was not herself denied promotion due to her sex where there was no position open when she demanded promotion, she was an aggressive employee who antagonized her supervisors and demanded, rather than requested, promotion, and her employment record did not substantiate her claim she was doing an outstanding job.

SUMMARY

Customer and coworker and similar preferences are not enough to establish a BFOQ, because the language of Title VII permitting a BFOQ exception when "reasonably necessary to the normal operation" of an employer's business requires a business necessity test, not a business convenience test.

State protective laws generally do not justify a BFOQ exception, and to the extent, but only to the extent, they conflict with Title VII, courts will declare them invalid or else extend them to the excluded sex. Most of the decided cases in this area have settled for invalidation rather than extension, usually because of a reluctance to usurp legislative functions, but it is impossible at this time to say there is a true consensus.

Marital status alone does not justify a BFOQ exception, and an employer who treats female employees who marry or are married differently from male employees who marry or are married is in violation of Title VII.

Employer policies excluding women from a particular job because of stereotyped assumptions about the physical ability of women in general to handle the demands of the job do not qualify for a BFOQ exception. Nor can an employer's policy requiring females to meet certain height, weight, and similar arbitrary physical standards qualify as a BFOQ when the same policy does not extend to males and business necessity is not involved.

In other general aspects of hiring, promotion, and transfer practices, it has been held that a woman charging an employer with sex discrimination in hiring does not necessarily have to allege she actually applied for employment and was rejected in order to state a cause of action if she alleges in the alternative that she was deterred from making application because the employer had indicated an express preference for males.

Nonvalidated procedures for promotion to management-level jobs which have the effect of favoring males over females are objectionable. Similarly, promotional systems dependent upon supervisory recommendation uncontrolled by clearly delineated and objective job criteria and which result in discriminatory job standards violate Title VII.

Even where an employer promotes a better qualified male in preference to a female, actionable discrimination may still exist if the employer refused to consider the female for the position because of her sex.

APPENDIX D-1

SEX DISCRIMINATION IN EMPLOYMENT--RECRUITING[1]

RECRUITMENT GENERALLY

Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970), is a leading case on word-of-mouth recruitment. It appeared that the employer obtained most of its new employees through recommendation and recruitment by existing workers and through acceptance of walk-in applicants. At the trial, the plaintiff, a black, introduced statistical evidence showing, among other things, that at the time he applied for employment, 1.82 percent of the work force was black, and no blacks worked as craftsmen, draftswomen, or in sales. The Court held that these statistics established a violation of Title VII as a matter of law. The Court also held that the system of recruiting new workers operated to discriminate against blacks, but because the employer had instituted an affirmative hiring plan subsequent to the plaintiff's application for employment, the Court declined to issue an injunction and instead remanded the case with directions to retain jurisdiction for a reasonable period to insure continued implementation of a policy of equal employment opportunities.

In U. S. v. Georgia Power Co., 474 F.2d 906 (5th Cir. 1973), the plaintiffs, blacks, challenged Georgia Power's practices of word-of-mouth recruiting and of recruiting for skilled personnel only at all-white institutions. The district court had rejected these challenges, saying that advertisement of existing vacancies by word-of-mouth on the part of company employees had been its best means for recruitment, and often for promotion, from time immemorial, and that it had been done by both blacks and whites. Nor, the district court had said, was there any significance in the places of conducting interviews for possible management personnel.

The appellate court disagreed and, noting that only 7.2 percent of the company's labor force was black although blacks constituted a much larger percentage of the available labor force, said (fn. 925):

> Under word-of-mouth hiring practices, friends of current employees admittedly received the first word about job openings. Since most current employees are white, word-of-mouth hiring alone would tend to isolate blacks from the "web of information" which flows around opportunities at the company. * * *
>
> * * * Word-of-mouth hiring and interviewing for recruitment only at particular scholastic institutions are practices that are neutral on their face. However, under the facts of the instant case, each operates as a "built-in headwind" to blacks and neither is justified by business necessity. While the Court was without doubt free to leave these practices available for future use, its failure to order them to be supplemented by affirmative action on the part of Georgia Power Co. was clearly an abuse of discretion. (Emphasis supplied.)[2]

The Fifth Circuit declined to spell out what those affirmative steps should be, but it suggested for the consideration of the district court on remand the use of advertisements of openings in newspapers and periodicals accessible to the black communities of Atlanta and other Georgia cities, and the giving of public notice that the company was an equal opportunity employer. The Fifth Circuit also said that while the company

1. All cases involve Title VII unless otherwise indicated.

2. See also Long v. Sapp, 502 F.2d 34 (5th Cir. 1974).

ought not to be enjoined to recruit on all college campuses, it also ought not to be allowed to continue to restrict its recruitment to all-white (or predominantly all-white) institutions while maintaining such a racially imbalanced work force.

In Gresham v. Chambers, 501 F.2d 687 (2nd Cir. 1974),[3] a black female sued to enjoin the president of a community college from appointing a white female as an associate dean. The principle issue was whether the president, in exercising the power to appoint members of his staff at the level of associate dean, had to use open recruiting as the method of selection. The plaintiff alleged that the president, by selecting the white female through informal word-of-mouth methods, had precluded the plaintiff from being considered.

The evidence showed that in the latter part of 1972, the president had decided to appoint a woman as associate dean so as to give more female representation at the administrative level. The president considered seven women and ultimately, without engaging in public recruiting or obtaining the faculty's approval, appointed a wife of a member of his vice-president's staff. The evidence also showed that 5 percent of the county in which the college was located was black, 3.6 percent of the 18,000 students were black, and 9.8 percent of the 450 faculty members were black.

Under these facts, the trial court had denied preliminary relief, and the Second Circuit affirmed, saying (p. 691):

> Only upon a showing of unlawful discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting. Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discriminatory. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to safeguard against their perpetuation or recurrence. * * * However, absent such a showing, word-of-mouth recruiting will not be barred. (Emphasis supplied.)

In U. S. v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D. N.C. 1971), supplemented 352 F. Supp. 1253 (1972), it was held that where a company had traditionally white job classifications, it was unlawful for it to limit notice of future opportunities in such classifications to word-of-mouth recruitment, and it was unlawful to give false, misleading or incomplete information to blacks or to fail or refuse to inform blacks of procedures and opportunities for obtaining employment.

In Wetzel v. Liberty Mutual Insurance Co., 508 F.2d 239 (3rd Cir. 1975), evidence that the defendant's recruiting brochures for the job of claims representative described it as Fit for a Queen, that brochures entitled A Management Career in Liberty Mutual's Claims Department challenged the applicant for the job of claims adjuster with the inquiry, Are you the right man?, and that the training manual for claims representatives was replete with feminine pronouns established, in conjunction with statistical evidence, a prima facie case of sex discrimination as between the job of claims representative and claims adjuster.

Another aspect of recruitment was considered in Kaplowitz v. University of Chicago, 387 F. Supp. 42 (N.D. Ill., 1974), where women graduates of the law school brought an action alleging that the law school,

3. The action was brought under 42 U.S.C.A. Sections 1981, 1983. See Appendix A-1.

through its placement service, maintained a policy of allowing employers which the school knew or should have known engaged in discrimination against women to use the facilities of the law school to interview and otherwise seek to hire students and graduates of the school. They contended the law school was operating an "employment agency" within the meaning of Title VII, and that as such, it was violating Section 703(b).[4]

The Court agreed with the first contention, but said the law school was not required to make a determination as to whether particular firms were engaging in discrimination or to prohibit those firms from interviewing at the law school, since the law school had performed its duty once it referred all prospective employees, including women, to the law firms for employment.[5]

HELP WANTED ADS

In Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376, 93 S.Ct. 2553 (1973), the Court considered a Pittsburgh Human Relations ordinance which prohibited any employer from publishing any advertisement relating to "employment" which indicated any discrimination because of sex, and in a later section prohibited any person from aiding in the doing of any act declared to be an unlawful employment practice by the ordinance. A Pittsburgh newspaper was charged with having violated the ordinance by accepting sex-designated advertising columns and thereupon contended the ordinance interfered with its First Amendment rights. But the Court held otherwise. None of the advertisements, it said, expressed a position on whether, as a matter of social policy, certain positions ought to be filled by members of one or the other sex, nor did any of them criticize the ordinance. Each, therefore, was no more than a proposal of possible employment and thus a classic example of "commercial speech," not protected by the First Amendment.[6]

Title VII has no counterpart to the section of the Pittsburgh ordinance that made the newspaper's carrying of sex-designated advertising columns a violation. However, Section 704(b) of Title VII[7] provides in substance that it shall be an unlawful employment practice for an employer or an employment agency to publish or cause to be published any notice or advertisement relating to employment indicating a preference or

4. See Appendix B. In Kaplowitz, it was also said the constant use of masculine pronouns by law firms and interviewing organizations in their job-description correspondence was not, per se, an unlawful sex specification indicating an unwillingness to consider women. Cf. Wetzel, supra.

5. The law school did not permit any firm to designate which students it wanted to interview and required each firm to interview all students who signed up for interviews without regard to race, color, creed, sex, national origin, class standing, or grade-point average.

6. United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), cert. den'd. 409 U.S. 934, 93 S.Ct. 235 (1972), rejected a newspaper publisher's First Amendment challenge to Section 804(c) of the Civil Rights Act of 1968, which prohibits the publication of racially discriminatory advertisements for the sale or rental of a dwelling.

7. 42 U.S.C.A. Section 2000e-3(b). See Appendix B.

limitation based on race, color, religion, sex, or national origin, except that such a notice or advertisement may indicate a preference or limitation based on religion, sex, or national origin when religion, sex, or national origin is a bona fide occupational qualification. In 1968, the EEOC issued a guideline[8] interpreting Section 704(b) and saying that the placement of an advertisement in columns classified by publishers on the basis of sex would be considered an expression of a preference or limitation based on sex, in violation of Title VII.

A newspaper publishers' association and a Washington newspaper then sought a declaratory judgment that the EEOC lacked authority to issue the guideline and also sought to enjoin it from enforcing the guideline. American Newspaper Publishers Association v. Alexander, 294 F. Supp. 1100 (D.C. 1968). The Court, noting that the guideline was not a regulation having the force of law, nevertheless said it was a reasonable interpretation of Section 704(b) and denied the motion for a preliminary injunction.

In 1970, on the theory that a newspaper running help-wanted ads was an "employment agency" within the meaning of Section 703(b)[9] and Section 704 of Title VII, a San Francisco woman in the market for employment sought to enjoin certain local newspapers from listing employment advertisements in classified sections under separate "Men" and "Women" headings when sex was not a bona fide occupational qualification. Brush v. San Francisco Newspaper Printing Co., 315 F. Supp. 577 (N.D. Cal. 1970), aff'd. 469 F.2d 89 (9th Cir. 1972), cert. den'd. 410 U.S. 943, 93 S.Ct. 1369 (1973). She alleged that many of the jobs which interested her were listed under the heading "Help Wanted--Men," and that she was effectively discouraged from making application for them due to the inference created by the advertisement that the employer did not want to hire a woman, although she would have made an application if the ads had been listed without a preference for men.

In dismissing the suit for failure of the complaint to state a claim, the Court examined the legislative history and concluded Congress had never intended newspapers to be treated as "employment agencies" for the purpose of Title VII. Newspapers, it said, although in the business of publishing advertising copy presented by employers, professional employment agencies, and job seekers, were not in any other or ordinary sense engaged in the business of procuring employees or employment opportunities--any more than they were engaged in the used car business or in the real estate business when they accepted and printed advertising copy designed to bring buyers and sellers together in those fields.

The same issue arose and a like result was reached in Greenfield v. Field Enterprises, Inc., ___ F. Supp. ___, 4 FEP Cases 548 (N.D. Ill. 1972). In addition, the Court rejected an argument by the EEOC that the guideline discussed in American Newspaper Publishers Association, supra, included the want-ad activities of newspapers. At the end of its opinion, the Court said (pg. 552):

> It seems appropriate to suggest, however, to the defendant, however gratuitously, that the position of the plaintiffs is an idea whose time has come and that serious consideration be given to a revision of the classification practices in employment advertising without reference to and free from the compulsion of the jurisdiction of the court.

8. 29 CFR Section 1604.5

9. 42 U.S.C.A. Section 2000e-2(b). See Appendix B.

In yet another similar case, Morrow v. Mississippi Publishers Corporation, ___ F. Supp. ___, 5 FEP Cases 287 (S.D. Miss. 1972), the defendant, after filing an answer denying it was an employment agency as defined by Title VII, filed a motion for summary judgment based on the pleadings. The motion was denied on the narrow ground the newspaper involved carried a notice in its want-ad section stating it reserved the right to reject, edit, and classify all copy. The Court said that if the newspaper had taken an active part in classifying the jobs advertised in its help-wanted columns, pursuant to its statement of policy, it might qualify as an employment agency, and therefore the plaintiff was entitled to proceed in her attempt to prove the newspaper was such an agency.[10]

Another type of want-ad issue was involved in Hailes v. United Air Lines, 464 F.2d 1006 (5th Cir. 1972). The plaintiff, a male, read a New Orleans newspaper ad for stewardesses placed by United in the "Help Wanted--Females" column. There was no corresponding advertisement for cabin stewards in the "Help Wanted--Male" column, and Hailes brought suit under Title VII without ever having applied to United for a job.

United, accordingly, argued that since he had never applied for employment, he had not been injured and therefore had no standing to sue. To this, the Court said (pg. 1008):

> But this position requires too much. The very appearance at an employer's offices of one who had read the discriminatory ad but nevertheless continued to seek the job, would demonstrate that the reader was not deterred by this unlawful practice and therefore not aggrieved. Thus, if we were to hold that Hailes cannot challenge this advertisement, then nobody could ever complain of this practice which Congress has so directly proscribed. However, we refuse to rule that a mere casual reader of an advertisement that violates this Section may bring suit. * * * To be aggrieved under this subsection a person must be able to demonstrate that he has a real, present interest in the type of employment advertised. In addition, that person must be able to show he was effectively deterred by the improper ad from applying for such employment. (Emphasis supplied.)

The Court then remanded the case to the district court for further proceedings and said that if Hailes proved all his various allegations, the broadest relief available would be an injunction restraining the publication of advertisements such as the one in issue and affirmatively requiring United to consider any job application Hailes might choose to submit promptly.

10. Results similar to Brush and Greenfield but involving New York laws rather than Title VII, were reached in the two New York cases of National Organization for Women v. Buffalo Courier-Express, Inc., 337 N.Y. S.2d 608 (S.Ct. 1972), and National Organization for Women v. Gannett Co., Inc., 338 N.Y. S.2d 570 (S.Ct., A.D. 1972). For a contrary result reached under New Jersey law, see Passaic Daily News v. Blair, 308 A.2d 649 (N.J. 1973).

APPENDIX D-2

SEX DISCRIMINATION IN EMPLOYMENT--DISCHARGE

In Danner v. Phillips Petroleum Co., 447 F.2d 159, reh. den'd., 450 F.2d 881 (5th Cir. 1971), a female plant clerk was held to have been discriminated against because of her sex where she showed that she had been discharged in a plant economy move because she possessed no bumping or bidding seniority rights, that no woman in the plant had such rights, and that the work she was doing was substantially similar to the work done by men who did have bumping and bidding rights.

The propriety of a termination caused by an employee's loss of her accumulated seniority bidding rights when she took a mandatory maternity leave was an issue in Satty v. Nashville Gas Company, 384 F. Supp. 765 (M.D. Tenn. 1974). Such rights were not lost in the case of temporary absence from work because of other disabilities.

The plaintiff's principal duties had involved the posting of merchandise accounts, and the employer, prior to her pregnancy, had intended to transfer certain of its accounting functions to its computer processing department and to discontinue its merchandise operations. Both steps were taken while the plaintiff was on maternity leave, and as against her claim this failure to hold her job open was sex discrimination, it was held the two business reasons for eliminating the job were legitimate and sufficient. The issue of loss of seniority bidding rights was in the case because the plaintiff, after returning from maternity leave, was given temporary work which came to an end a month later. However, because she was totally frustrated in her efforts to regain a permanent position due to the maternity-leave loss of her accumulated seniority in job bidding, it was also held the termination violated Title VII.

In Francis v. American Telephone and Telegraph Co., Long Lines Department, 55 F.R.D. 202 (D.C. 1972), the evidence showed that the plaintiff, a black female working for the telephone company, had been late reporting to work for one-third of the work days in February, 1966, one-half of the work days in March, and two-thirds of the work days in May. On a day in September, when she had been late three days out of four during that week, she was called to the office of a supervisor and reprimanded about her loud personal telephone conversations, which disturbed other employees. She was warned that if she did not become more punctual and curtail her use of the telephone, she would be fired. In November, she was again reprimanded for excessive tardiness and phone use, and in February, 1967, she was reprimanded for tardiness, absenteeism, and excessive phone use. That same month she filed a complaint with the EEOC, and thereafter there was a pattern of oppressive supervision and constant surveillance until she was finally discharged in May.

The Court, while finding there had been no discrimination prior to the filing of the EEOC complaint, said the actions of the telephone company's supervisors after the filing of the complaint were in retaliation and thus in violation of Title VII.

In another case involving discharge after the filing of a complaint with the EEOC, it was said that the discharged female employee was entitled to a temporary injunction requiring the employer to reinstate her for a 300-day period following the filing of the complaint, since the discharge in and of itself established

a prima facie case of reprisal, which the employer had not rebutted. Hyland v. Kenner Products Co., ___ F. Supp. ___, 10 FEP Cases 367 (S.D. Ohio 1974).

In Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971), a female procedures writer's contention that her employer had discharged her, in violation of Title VII, because she constantly complained of low pay based on her sex was rejected where there was evidence that her complaints about low pay, of which there were 32, had begun while she was still a junior clerk-steno and had persisted when she was transferred to the publications section of the company at a time when she was earning more money than the only other procedures writer, a male, and that, during a period when there was no male procedures writer paid more than she, she demanded higher pay on 14 occasions. The Court agreed with the employer's contention she had been discharged because of accumulated incidents and not because of her sex, and while her constant complaints about being underpaid had some bearing on the employer's ultimate decision to discharge her, this stemmed from the complaints as such, not as complaints of underpayment by reason of sex. In addition, she had persisted in violating a company rule prohibiting the bringing of personal equipment to work; she had improperly used a government typewriter and paper for personal correspondence; she had dramatically protested an "average" efficiency rating; and she had been using amphetamines and barbiturates for thirty years.[1]

In Frockt v. Olin Corp., 344 F. Supp. 369 (S.D. Ind. 1972), it was said that a numerical imbalance between men and women employees in various job classifications, without more, did not establish the employer had treated the plaintiff herself in a discriminatory fashion, and where the plaintiff was unable to get along with supervisory personnel, failed to follow the instructions of her supervisors, and concerned herself with duties and responsibilities entrusted to other persons, resulting in the neglect of her own job, she was discharged because of her misconduct and not because of discrimination proscribed by Title VII.

1. Evidence which disclosed that a black female probationary employee hired by a state's department of highways refused to complete some tasks assigned to her, continually made errors on reports, was late for work on numerous occasions, took three days sick leave, three days annual leave, and a one day leave without pay within a seven-month period, was insubordinate, and refused to follow instructions, was held to refute charges of racial and sexual discrimination under Title VII. Courtney v. Louisiana Dept. of Highways, 282 So.2d 721 (La. App. 1973), cert. den'd. 286 So.2d 365 (La. 1973).

APPENDIX E

SEX DISCRIMINATION IN EMPLOYMENT--MATERNITY AND PREGNANCY POLICIES[1]

In general, two main types of cases arise in connection with sex discrimination charges related to maternity or pregnancy in employment. In the first, the employee challenges mandatory leave policies imposed at a fixed time during pregnancy, or mandatory recovery and return periods after the birth of the child. The leave policies so challenged usually mean no pay during the period of absence from work and sometimes entail a risk the individual will not recover her job.

In the second type, the employee challenges the refusal of the employer (or a disability plan) to extend the same benefits for temporary absence caused by pregnancy as it does for absence due to temporary disabilities generally.

The two types of cases will be considered below.

MANDATORY MATERNITY OR PREGNANCY LEAVES

In most of the cases that follow, the women plaintiffs introduce medical evidence to support the argument they were not physically disabled from performing their duties on the job, while the employers usually respond with evidence to the effect that pregnant women in general require assistance, or that the particular mandatory rule eliminates the administrative problems involved in making individual determinations of disability.

Representative cases are cited below, and are followed by a sampling of judicial opinion from them. Finally, consideration is given to Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 791 (1974).

Cases:

Williams v. San Francisco Unified School District, 340 F. Supp. 438 (N.D. Cal. 1972). Section 1983[2] action. For purpose of motion for preliminary injunction, school district's policy that pregnant employee absent herself from duty without pay for at least two months before anticipated birth of her child offends equal protection clause.

Bravo v. Board of Education of City of Chicago, 345 F. Supp. 155 (N.D. Ill. 1972). Section 1983 action. For purpose of preliminary injunction, board of education's policy requiring pregnant teachers to stop work during their sixth and subsequent months of pregnancy and for two months thereafter offends equal protection clause. Traditional equal protection standard used.

1. The cited cases are not necessarily brought under Title VII. Where relevant, the particular law involved will be indicated. Prior to the effective date of the 1972 amendment of Title VII, of course, challenges to the maternity and pregnancy policies of educational institutions could not be made under Title VII.

2. Section 1983 here and through the rest of this appendix refers to 42 U.S.C.A. Section 1983. See Appendix A-1.

Pocklington v. Duval County School Board, 345 F. Supp. 163 (M.D. Fla. 1972). Requiring pregnant first-grade teacher to begin leave of absence after four and a half months of pregnancy offends equal protection clause.

Heath v. Westerville Board of Education, 345 F. Supp. 501 (S.D. Ohio 1972). Since no two pregnancies are alike, decision as to when a pregnant teacher should discontinue working is matter best left up to woman and her doctor. Regulations of school board requiring mandatory resignation of pregnant female employees after fifth month of pregnancy and requiring them to wait one year following delivery before being eligible for reemployment violative of equal protection in that regulations treat pregnancy differently from other disabilities.

Monell v. Department of Social Services of City of New York, 357 F. Supp. 1051 (S.D. N.Y. 1972). Section 1983. Summary judgment denied when question of fact existed as to whether women employees were compelled in every case to leave their employment at the seventh month of pregnancy except when eighth occurred during last month of school term or whether individualized medical judgment was made in each case.

Jinks v. Mays, 332 F. Supp. 254 (N.D. Ga. 1971), remanded on other grounds, 464 F.2d 1223 (5th Cir. 1972). Section 1983. Board of education's policy of granting maternity leave to tenured teachers but not to untenured teachers was arbitrary and a violation of equal protection.

Seaman v. Spring Lake Park Independent School District No. 16, 363 F. Supp. 944 (Minn. 1973). Section 1983. Preliminary injunction granted against school district's attempt to force seven-months pregnant teacher to take immediate semester's leave of absence contrary to her wishes to continue her team teaching until confinement and to return to teaching three weeks after having given birth, since the only apparent reason for school district's action was an unalterable biological sex-related function which did not impair her ability to teach.

Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974). Section 1983. Plaintiff's request for injunction against mandatory maternity leave policy which required pregnant teacher to discontinue her employment after seventh month of pregnancy regardless of her physical capability to perform duties for longer period mooted by change in defendants' regulations.

Singer v. Mahoning County Board of Mental Retardation, 379 F. Supp. 986 (N.D. Ohio 1974). Title VII. Policy that pregnant teacher cannot work beyond fifth month of pregnancy constitutes sex discrimination.

Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973). Title VII. Airline's policy of requiring female ground employees to go on maternity leave at end of fifth month of pregnancy was not shown to be reasonably necessary to normal operation of airline's business and hence violated Title-VII. Court, however, did not determine propriety of airline's policy of permitting those on maternity leave to be permanently replaced, since evidence showed that failure of the airline to rehire plaintiff was attributable to general business slowdown.

Schattman v. Texas Employment Commission, 459 F.2d 32 (5th Cir. 1972). Title VII, equal protection clause. Former employee alleged that Texas Employment Commission's policy of terminating employment of pregnant female employees two months prior to expected delivery date violated Title VII. Held, even if Commission an employment agency within meaning of Title VII, it was exempt (under Act as written at time case arose) as a state agency. Also, regulation was not so unreasonable as to offend equal protection clause.

Green v. Waterford Board of Education, 473 F.2d 629 (2nd Cir. 1973). Section 1983. School board's policy requiring maternity leave without pay to begin not less than four months prior to expected confinement or at such time as replacement became available arbitrarily forced physically capable woman to leave her job before being required to do so for medical reasons and was discriminatory. Interest of state in health and safety of teacher and unborn child, continuity of education, and administrative convenience not sufficiently promoted by the policy to justify such discrimination. Board not prevented, however, from considering question of leave for pregnant teachers on an individual basis.

Buckley v. Coyle Public School System, 476 F.2d 92 (10th Cir. 1973). Section 1983. Regulations requiring dismissal at end of sixth month of pregnancy penalized female teacher for being a woman; it was immaterial whether pregnancy was voluntary. State must demonstrate compelling interest to justify the regulation because interest involved is fundamental one in that (1) it concerns acknowledged right of plaintiff to bear children and (2) it demands that a schoolteacher select either employment or pregnancy.

Excerpts from Preceding Cases

From Williams, supra, (pg. 443):

In addition to the test developed by the Supreme Court that a questioned classification must be rationally related to a legitimate state goal to be upheld under the equal protection clause, a more demanding standard must be met where, as here, the members of the class allegedly discriminated

against assert a threat to their basic constitutional or civil rights.

From Heath, supra, (pg. 505):

(T)his Court is willing to conclude that there are certain ineluctable differences between men and women and between pregnant and nonpregnant women. Legislation attempting to draw a distinction between these groups is not per se violative of the Equal Protection Clause. However, in the case at bar the defendant Board of Education has completely failed to demonstrate a rational, non-arbitrary basis in fact for the regulations in question and a tenuous relationship between them and the ends sought to be achieved. * * *

It is the very inflexibility of the Board's policy which casts a light of dubious constitutionality about its regulations. Pregnancies, like law suits, are sui generis. * * * While it may be quite true that some women are incapacitated by pregnancy and would be well advised to adopt regimens less strenuous than those borne by school teachers, to say that this is true of all women is to define that half of our population in stereotypical terms and to deal with them artificially. Sexual stereotypes are no less invidious than racial or religious ones. * * * Any rule by an employer that seeks to deal with all pregnant employees in an identical fashion is dehumanizing to the individual women involved and is by its very nature arbitrary and discriminatory.

From Green, supra, (pg. 635-6):

As to safety, it is depressingly true these days that violence from students is a possibility, not pure fancy. Whether that possibility justifies treating pregnant teachers differently from male teachers is highly questionable. When the comparison is with other female teachers, any justification for focusing solely on those who are pregnant is still more dubious in the abstract and wholly so on this record. * * * An additional state interest--avoiding "classroom distractions" caused by embarrassed children "pointing, giggling, laughing and making snide remarks" about their teacher's condition--emerges from one of "the several cases" to which defendants refer. We regard any such interest as almost too trivial to mention; it seems particularly ludicrous where, as here, plaintiff taught only high school students. Whatever may have been the reaction in Queen Victoria's time, pregnancy is no longer a dirty word.

The only substantial justifications for the Board's maternity leave rule relate to continuity of classroom education and to administrative efficiency and convenience. * * *

* * *

Continuity of instruction is surely an important value. Where a pregnant teacher provides the Board with a date certain for commencement of leave, however, that value is preserved; an arbitrary leave date set at the end of the fifth month is no more calculated to facilitate a planned and orderly transition between the teacher and a substitute than is the date fixed closer to confinement. * * *

Turning to the additional administrative convenience suggested of avoiding many "battles of obstetricians," we put to one side the thought that the district court's analysis could as well justify a much harsher rule, requiring maternity leave to start at the end of three months of pregnancy, or two. More to the point, a disagreement between physicians may arise any time a teacher's medical problems might, in the eyes of the school administration, inhibit satisfactory performance of classroom obligations at some point in the future; yet the Board apparently chose to avoid medical "battles" only in the case of pregnancy.

Two cases involving mandatory maternity leaves, one from the Sixth Circuit; one from the Fourth Circuit,[3] and brought under Section 1983,[4] finally reached the Supreme Court in Cleveland Board of Education v. LaFleur, Cohen v. Chesterfield County School Board, 414 U.S. 632, 94 S.Ct. 791 (1974).

The Cleveland rule required a pregnant teacher to take unpaid maternity leave five months before the

3. LaFleur v. Cleveland Board of Education, 465 F.2d 1184 (6th Cir. 1972); Cohen v. Chesterfield County School Board, 474 F.2d 395 (4th Cir. 1973).

4. It is a curious aspect of the decision that, although both cases were decided in the lower courts on equal protection grounds pursuant to Section 1983, the Supreme Court itself relied on the due process clause.

expected childbirth, with the application for such leave to be made at least two weeks before her departure. The teacher could not return to work until the first next regular semester after her child was three months old. The Chesterfield County rule required the teacher to leave work at least four months, and to give notice at least six months, before the anticipated childbirth. Re-employment was guaranteed no later than the first day of the school year after the date the teacher was declared re-eligible. Both the Cleveland and the Chesterfield County rules required a physician's certificate of physical fitness prior to the teacher's return.

In holding the mandatory leave provisions of both rules violated the due process clause of the Fourteenth Amendment, the Court said (pg. 796):

> This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. * * *
>
> By acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms. * * * (T)he Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty.

While approving of the advance notice provisions in the rules as being wholly rational and perhaps even necessary to serve the objective of continuity of instruction, the Court found the absolute requirements of termination at the end of the fourth or fifth month of pregnancy entirely the opposite (pg. 798):

> The * * * rules surely operate to insulate the classroom from the presence of potentially incapacitated pregnant teachers. But the question is whether the rules sweep too broadly. * * * That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor--or the school board's--as to any particular teacher's ability to continue at her job. The rules contained an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary.[5,6]

Footnote 13 to the opinion provides an indication as to how the Court might view maternity leave policies drafted in response to its decision in LaFleur. After stating that administrative convenience alone was insufficient to make valid what otherwise would be a violation of due process, the Court continued (pg. 799-800):

> This is not to say that the only means for providing appropriate protection for the rights of pregnant teachers is an individualized determination in each case and in every circumstance. We are not dealing in these cases with maternity leave regulations requiring a termination of employment at some firm date during the last few weeks of pregnancy. We therefore have no occasion to decide whether such regulations might be justified by considerations not presented in these records--for example, widespread medical consensus about the "disabling" effect of pregnancy on a teacher's job performance during these latter days, or evidence showing that such firm cutoffs were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom, or proof that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.

5. The Court also approved of the Chesterfield County rule as to when a teacher would become eligible for re-employment, but disapproved of the Cleveland return rule, insofar as it embodied the provision that a mother had to wait until her child reached the age of three months before the return rule began to operate. This, it said, was wholly arbitrary and irrational.

6. Justice Powell concurred in the result, but stated he felt that equal protection analysis was the appropriate frame of reference. He emphasized that the Court's opinion endorsed the blanket right of a school board to demand substantial advance notice of pregnancy and to restrict the return to teaching to the outset of the school term following delivery.

LaFleur, therefore, does not abolish all mandatory school-board maternity leave policies. School boards (and other employers) may still establish policies that do not arbitrarily infringe upon each individual woman's teaching capabilities. But mandatory termination and return dates must be justified by sufficient evidence.

Exactly this kind of accommodation took place in de Laurier v. San Diego Unified School District, __ F. Supp. ___, 10 FEP Cases 361 (S.D. Cal. 1974), an action brought on constitutional and Title VII grounds, where the Court, relying on Footnote 13 from LaFleur, upheld a rule requiring a pregnant teacher to take a leave at the end of eight months of pregnancy. The school district presented medical evidence relating to the declining ability of pregnant women that late in term to perform effectively, as well as evidence relating to miscalculations by doctors as to the predicted date of delivery.

With respect to LaFleur, the Court said there was no violation--as measured against the interests of the teacher, the pupils, and the maintenance of orderly education--of due process or equal protection. With respect to Title VII, it said the school district had met its burden of proof and established that the unique responsibilities of a school teacher required a four-week maternity leave policy, that the policy was justified by business necessity, and that it was a BFOQ.

In Bradley v. Cothern, 384 F. Supp. 1216 (E.D. Tex. 1974), also decided after LaFleur, it was said that the action of a school district in not employing arbitrary cutoff dates with respect to maternity but instead allowing a teacher to continue as long as she was able, and requiring her to submit a resignation when she learned she was pregnant, was a constitutional administration of its leave policy where the resignation was used as a notification device to promote continuity of instruction by allowing school officials to plan for the coming semester. But to avoid a violation of due process, it was incumbent upon the district to give such a teacher a priority right to return to teaching when the first available position in her field became vacant, and where a superintendent knew a teacher wanted to return to full-time teaching after the birth of her child, the district's denial of such an opportunity unnecessarily penalized her for asserting her right to bear children and thus infringed due process. Reinstatement was ordered as of the spring semester of 1975, presumably the first full semester after the issuance of the injunction in November of 1974.

In another case decided after LaFleur, Satty v. Nashville Gas Company, 384 F. Supp. 765 (M.D. Tenn. 1974), no violation of Title VII occurred where the employer, in deciding when a maternity leave should commence, customarily weighed the opinion of the employee's doctor, the employee's duties, her contact with the public, and her work area, and where, in the particular case, the pregnant employee, who failed to report for work on four consecutive days after a four-day Christmas holiday because of problems with water retention, was required to take a maternity leave immediately and gave birth to her child twenty-five days later.

LaFleur was also applied in Paxman v. Wilkerson, 390 F. Supp. 442, (E.D. Va. 1975), with respect to a school district's policy of requiring a teacher who became pregnant prior to reporting for duty at the beginning of the year to obtain a release from her contract. Back pay was allowed to a teacher dismissed because of the policy.

And in Holthaus v. Compton & Sons, Inc., ___ F.2d ___, 10 FEP Cases 601 (8th Cir. 1975), Title VII was violated where a female employee who had to be absent from work because of complications during pregnancy was discharged, and the evidence showed that (1) the employer had no defined maternity leave policy, (2) the employer historically permitted employees who were absent from work because of illness to draw on accumulated vacation time and then to go on sick leave without pay, (3) the employer could not substantiate its "business necessity" argument that the employee's work was piling up and no one else could handle it, and (4) the employer had previously discharged two other employees who had become pregnant.

EXCLUSION OF PREGNANCY-RELATED DISABILITIES FROM DISABILITY-BENEFITS COVERAGE

The EEOC guidelines[7] provide in substance that female employees must receive maternity benefits if wives of male employees receive them; that disabilities caused by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities, and should be treated as such under any health or temporary disability insurance of sick-leave plan available in connection with employment; that benefits under any health or temporary disability insurance or sick-leave plan should be applied to disability due to pregnancy or childbirth on the same terms as they are applied to other temporary disabilities; and that where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination violates Title VII if it has a disparate impact on employees of one sex and is not justified by business necessity.

The guidelines are entitled to great deference by the courts,[8] but they are not binding on them. These guidelines, however, and the pregnancy-related problems with which they deal have been extensively considered in two important recent cases, Gilbert v. General Electric Co., 375 F. Supp. 367 (E.D. Va. 1974), and Wetzel v. Liberty Mutual Insurance Co., 372 F. Supp. 1146 (W.D. Penn. 1974).[9]

Gilbert is on appeal to the Fourth Circuit, where argument was heard in January, 1975. Wetzel was

7. 29 CFR Section 1604.9(a), (b), (d); Section 1604.10(b), (c).

8. Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849 (1971). See Appendix C.

9. In Farkas v. South Western City School District, ___ F. Supp. ___, 8 FEP Cases 288 (S.D. Ohio 1974), aff'd. 506 F.2d 1400 (6th Cir. 1974), it was said a board of education violated Title VII when it put a pregnant teacher on unpaid leave of absence instead of permitting her to use her accumulated sick leave, notwithstanding that pregnancy was not within the ambit of an Ohio statute governing the payment of sick leave to employees of boards of education and in effect at the time the controversy arose. See also Scott v. Opelika City Schools, 63 F.R.D. 144 (M.D. Ala. 1974), a Section 1983 proceeding where it was said teachers who had been denied the right to use accumulated sick leave for maternity-related disabilities were entitled to a choice of immediately recovering the monetary award representing the accumulated sick leave they could have taken at the time of their pregnancies or retaining their present number of accumulated sick days unaffected by the previous school board policy of excluding maternity disability from sick-leave coverage. But see Newmon v. Delta Air Lines, Inc., 374 F. Supp. 238 (N.D. Ga. 1973), in which the guidelines were rejected and it was said pregnancy was neither a sickness nor a disability, but instead a voluntarily imposed condition demonstrating that a woman was quite healthy and normal.

affirmed in 511 F.2d 199, (3rd Cir. 1975), and is believed to be on its way to the Supreme Court. Since Wetzel was affirmed after the decision of the Supreme Court in Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974),[10] Aiello will be considered before it in the paragraphs that follow.

In Gilbert, it appeared that the weekly nonoccupational sickness and accident benefit payments General Electric provided to its employees excluded sickness or other disabilities arising from pregnancy, miscarriage, or childbirth. In Wetzel, it appeared that the contributory insurance plan for continuation of income Liberty Mutual provided its employees for illness requiring treatment by a doctor of eight or more calendar days which causes absence from work excluded disability due to pregnancy.

In finding that these exclusionary policies violated Title VII, both trial courts rejected the argument pregnancy could be excluded from equality of treatment because it was a voluntary condition. Or, as the Court in Wetzel put it (pg. 1158):

> Pregnancy is a natural condition, it is an expectable condition, it is a statistically forseeable condition, and ultimately it is a necessary condition. It is a condition limited to women, not by statutory law or custom, but by biological law.

As to the argument the cost to an employer of maintaining sickness and accident benefits would increase substantially if pregnancy disability were to be covered, the Court in Gilbert said (pg. 382):

> Primary, of course, is the principle that business necessity constitutes a valid defense only to a situation where the alleged discrimination arises from a policy neutral on its face, and in its intent. The instant case does not fall in this category. Additionally, it is doubtful in the first instance if cost alone would constitute a proper defense. * * * The business necessity rationale is premised on a policy of justification by virtue of a showing that the suspect conduct is necessary to the safe and efficient operation of the business. * * * No such situation exists here.

But two months after this decision, the Supreme Court decided Geduldig v. Aiello, supra, in which the Court upheld, as against a challenge on equal protection grounds, a provision of California's disability insurance program which excluded from coverage any work loss resulting from normal pregnancy. As was noted in Appendix A, the Court was clearly impressed by the fact that the program had been totally self-supporting and that income each year was usually approximately equal to expenses. In finding that the classification system used by California did not result in invidious discrimination offensive to the equal protection clause, it said (pg. 2491):

> Although California has created a program to insure most risks of employment disability, it has not chosen to insure all such risks, and this decision is reflected in the level of annual contribution exacted from participating employees. This Court has held that, consistently with the Equal Protection Clause, a State "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."

Because however, the minority in Aiello suggested that the majority was departing from certain recent Supreme Court precedents, the majority, in Footnote 20, added this further explanation (pg. 2492):

> The California insurance program does not exclude anyone from benefit eligibility because of gender, but merely removes one physical condition--pregnancy--from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification * * *.
>
> The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients

10. See Appendix A.

> into two groups--pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.11

The footnote, of course, raises a question as to what the Supreme Court will do when it eventually confronts a Title VII case involving similar issues.

In Communications Workers of America v. American Telephone and Telegraph Co., Long Lines Department, 379 F. Supp. 679 (S.D. N.Y. 1974), for example, and relying essentially on Footnote 20 to Aiello, the trial court dismissed complaints alleging that pregnant female employees had been denied, in violation of Title VII, the same benefits as were made available to male employees under temporary disability. The trial court, however, certified the Aiello question involved to the Court of Appeals, which remanded the case for a trial on the merits in ___ F.2d ___, 10 FEP Cases 435 (2nd Cir. 1975).

The appellate court said that Footnote 20 of Aiello concerned only equal protection standards of judicial scrutiny applicable to California's legislative classification of pregnancy; that the footnote made no reference to Title VII or the EEOC guidelines which prohibit disparate treatment of pregnancy disabilities, and that it was inconceivable the Supreme Court would circumscribe the reach of Title VII and invalidate the guidelines without mentioning them; and that the issue in the present case was one of statutory interpretation, not constitutional analysis.

The same result was reached in Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3rd Cir. 1975),[12] supra, where the Court said (pg. 203):

> In Geduldig v. Aiello, the Supreme Court held that the State of California could choose not to include disabilities relating to normal pregnancy within its disability insurance program and not be violative of the Fourteenth Amendment's prohibition against sex discrimination. The Court relied heavily on the fact that California's program was totally self-supporting, "never drawing on general state revenues." * * * We are not faced with an insurance program similar to Aiello's, and we need not attempt to balance public social welfare interests with the Constitution. An examination of California's program showed that only

11. See Miller v. Industrial Commission, 480 P.2d 565 (Col. 1971), where it was held a special statutory classification with respect to unemployment compensation payable in the event of pregnancy did not constitute an unreasonable discrimination against women workers. (It is only where the woman worker has become pregnant, the Colorado Supreme Court said, that she is treated differently--placed in a separate classification--from other men and women workers.) And in Turner v. Dept. of Employment Security, ___ P.2d ___, 10 FEP Cases 422 (Utah 1975), it was held that a Utah statute denying unemployment benefits to a pregnant woman in the weeks immediately before and after the date of delivery of her child did not, as to a woman who had been separated involuntarily from her job for reasons not related to pregnancy, offend the equal protection concepts extended by the Utah Constitution. But see also International Union United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Dir. and Michigan Employment Security Commission, ___ F. Supp. ___, 9 EPD P 9879 (E.D. Mich. 1974), decided a month after Aiello, in which it was held the practice of denying benefits under the Michigan Employment Security Act to women employees who were forced out of work due to so-called mandatory maternity leave clauses in contracts or to unilateral employment policies was unlawful as contrary to federal law.

12. See also Vineyard v. Hollister School District, ___ F. Supp. ___, 8 FEP Cases 1009 (N.D. Cal. 1974), where Aiello was distinguished on the ground that in Aiello there had been a showing of strong economic justification for the exclusion of pregnant teachers from disability benefits and on the further ground that Congress intended Title VII to have a broader reach than the equal protection clause. To like effect are Satty v. Nashville Gas Co., 384 F. Supp. 765 (M.D. Tenn. 1974) and Sale v. Board of Education, 390 F. Supp. 784 (N.D. Ia. 1975). However, in Seaman v. Spring Lake Park Independent School District, 387 F. Supp. 1168 (Minn. 1974), a Section 1983 rather than a Title VII case, the Aiello reasoning was used to uphold a bargaining agreement in which it was agreed maternity leave would be leave without pay. The classification was rational, it was said, because if sick pay were allowed for maternity leave, it would drain away money the school board and the teachers themselves would rather have available for salaries or other purposes.

normal pregnancy and delivery disabilities were excluded from the benefits, while Liberty Mutual excluded all pregnancy-related disabilities.

So, for the moment, the majority of the courts that have confronted the question raised by Footnote 20 have concluded that Aiello does not apply to Title VII cases.

MISCELLANEOUS

In Doe v. Osteopathic Hospital of Wichita, Inc., 333 F. Supp. 1357 (Kansas 1971), it was held that where the fact of pregnancy alone did not adversely affect a female office worker's job performance and her termination was in fact based on her marital state, that is, that she was unwed, the employee, who was approximatgly five and a half months pregnant at the time of her discharge, had been discharged in violation of Title VII.

In Danielson v. Board of Higher Education, 358 F. Supp. 22 (S.D. N.Y. 1972), the defendants' motion to dismiss or for summary judgment was denied, the Court holding that a complaint alleging that a husband's right to equal protection had been violated by the defendants' refusal to extend to him the same child-care leave privilege extended to women solely because he was a man, alleging that their refusal to pay his wife for the 12-day period during which she gave birth deprived her of property in violation of the Fourteenth Amendment, and alleging a denial of the right of personal liberty and an invasion of the right to privacy raised "colorable" constitutional claims on which relief might be granted at a trial on the merits.[13]

In Andrews v. Drew Municipal School District, ___ F.2d ___, 9 FEP Cases 235 (5th Cir. 1975), it was said a school district's policy of refusing to employ unwed parents as teacher's aides violated both the equal protection and the due process clauses of the Fourteenth Amendment. Unwed parenthood, the Court said, was not necessarily evidence of present immorality, and there were reasonable alternative means by which to remove or suspend teachers engaged in immoral conduct. Furthermore, there was no evidence to support the school district's contention unwed parents were improper role models after whom students might pattern their lives, nor was there evidence to support the contention the employment of an unwed female parent in the scholastic environment contributed to the problem of school-girl pregnancies.

In Drake v. Covington County Board of Education, ___ F. Supp. ___ 8 FEP Cases 198 (M.D. Ala. 1974), a Section 1983 action, it was said the board of education violated the constitutional right of privacy of a tenured, unmarried pregnant teacher when it cancelled her employment contract pursuant to a state statute authorizing such action for immorality, where (1) the evidence upon which the board acted had its source

13. Ackerman v. Board of Education of the City of New York, 387 F. Supp. 76 (S.D. N.Y. 1974), denied a "back pay" award to a male junior-high teacher who took a leave on his own volition when he was denied leave under the board of education's bylaws granting child-care leave to female teachers only and who did not apply to teach as a substitute (a privilege given female teachers who took child-care leave) because of his belief he was not in good standing with the board. The case arose prior to the time Title VII covered educational institutions, and the board of education subsequently amended its bylaws to eliminate this type of alleged discrimination.

in disclosures the superintendent of education solicited from the teacher's physician regarding her pregnancy, (2) the evidence failed to show the teacher consented to the physician's disclosure of her private communications with him, and (3) the board made no finding the teacher's claimed immorality had affected her competency or fitness as a teacher.

In Wardlaw v. Austin Independent School District, Civ. No. A-75-CA-17, ___ F. Supp. ___ (W.D. Tex., 1975), an unmarried teacher who was transferred from her classroom teaching position after she notified her superiors of her pregnancy was denied injunctive and declaratory relief. The Court said the teaching termination was justified by legitimate educational concerns because the class she taught, composed of special education students, particularly needed a learning environment free of the disruption and tension likely to be engendered by any public controversy which might arise, and there was no sex discrimination because there was no evidence males were treated differently. (It is believed the suit involved allegations of infringement of rights to privacy, free association, free expression, and due process, as well as a claim of discrimination based on sex--though whether on Title VII or equal protection grounds is not known. The case is expected to be appealed.)

SUMMARY

The courts have made clear that mandatory maternity leaves imposed by employers on pregnant employees at arbitrary times during their pregnancy will no longer be tolerated. Stereotypes about the capability of pregnant women to work at their jobs are objectionable, as are stereotypes about the amount of time a woman must remain away from her job after childbirth. The courts are constantly emphasizing that each pregnancy is different and judgments as to when a particular pregnant employee's maternity leave should begin must be made on an individualized basis, notwithstanding any administrative inconvenience to the employer.

On the other hand, employers might be permitted to make blanket regulations, the Supreme Court has hinted, requiring mandatory termination of employment at some firm date during the last few weeks of pregnancy (provided there is evidence of a medical consensus about the "disabling" effect of pregnancy on job performance during these latter days, or evidence showing such firm cutoffs are the only reasonable method of avoiding the possibility of labor beginning while the employee is at work, or proof that a replacement cannot be procured without at least some minimal lead time and certainty as to when the replacement's employment is to begin). But the fact that employers cannot, in general, impose mandatory maternity leaves on their employees at, say, the fifth month of pregnancy does not necessarily mean an employer must be willing to consider for employment a job applicant who is five months pregnant. And in Cheatwood v. South Central Bell Telephone and Telegraph Co., 303 F. Supp. 754 (M.D. Ala. 1969),[14] it was said that while an employer could not have a rule excluding all women from an allegedly strenuous job simply because some of them might become pregnant, it could have a rule against pregnant women being considered for the position.

Employers, of course, are entitled to make reasonable rules concerning the time of return to work by

the employee after childbirth. In Lafleur, the Supreme Court found reasonable a rule that a teacher would become eligible for re-employment upon submission of a medical certificate from her physician, with return to work being guaranteed no later than the beginning of the next school year following the eligibility determination. At the same time, the Court found it unreasonable to require the mother to wait until her child reached the age of three months before the return rule began to operate.

Many courts have held, with respect to Title VII and the EEOC guidelines concerning pregnancy, that a female employee who leaves work temporarily because of pregnancy must receive the same benefits and privileges as are accorded other employees who are absent from work because of temporary disabilities. The fact that pregnancy may be voluntary, or that extending such benefits and privileges to pregnant female employees may be expensive, is not a sufficient reason, these courts have said, to depart from the rule.

The Supreme Court, however, has not considered whether Title VII, as the EEOC guidelines maintain, requires extending such benefits and privileges to pregnant employees. In Aiello, though, it said that a state disability insurance program which excluded normal pregnancy from coverage was not an unconstitutional classification as far as equal protection was concerned. The decision, and one of its footnotes, creates uncertainty as to exactly how the Court will eventually deal with this aspect of Title VII.

APPENDIX F

SEX DISCRIMINATION IN EMPLOYMENT--FRINGE BENEFITS[1]

Section 703(a)(1) of Title VII[2] provides in part that it shall be an unlawful employment practice to discriminate with respect to "compensation, terms, conditions, or privileges of employment" because of sex.

The cases in Appendix E dealing with employers' maternity and pregnancy policies are incorporated here by reference to the extent they relate to the question of whether maternity leave and disability payments for pregnancy are fringe benefits of employment within the language quoted above.

Another major area for the application of this part of Title VII is, of course, pension benefits. But the concept of "pension benefits" involves at least these four separate subconcepts:

1. The equality of actual periodic payments received by male and female pensioners.
2. The equality of monthly contributions made to the pension plan by male and female employees.
3. The equality of monthly contributions made to the pension plan on behalf of male and female employees by the employer.[3]
4. The length of service necessary to qualify for a pension (as between men and women) or the age at which an employee may (or must) retire (as between men and women).

The courts have agreed that length of service or the age at which an employee may (or must) retire cannot be different as between men and women employees, and by implication they seem to have said, insofar as Title VII is concerned, that periodic payments received by male and female pensioners should, in most cases, be the same. There is also authority to indicate monthly employee contributions should not be different as between the two sexes.

Thus, in Mixson v. Southern Bell Telephone and Telegraph Co., 334 F. Supp. 525 (N.D. Ga. 1971), it was held that a widow had stated a cause of action when she alleged her husband's employer had denied her an annuity benefit on the basis of provisions in its pension plan which discriminated against her husband and male employees as a class because of their sex. Specifically, she alleged she had been denied an annuity because her husband, when he died, had been 59 years and 10 months old and thus had not reached the required retirement age, fixed under the pension plan at 60 years for males and 55 years for females.

In Bartmess v. Drewrys U.S.A., Inc., 444 F.2d 1186 (7th Cir. 1971), cert. den'd. 404 U.S. 939, 92 S.Ct. 274 (1971), a female employee challenged a reitrement plan which provided that female employees must retire at age

1. All cases involve Title VII unless otherwise indicated.
2. 42 U.S.C.A. Section 2000e-2(a)(1). See Appendix B.
3. EEOC guidelines provide that it shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other. 29 CFR Section 1604.9(f). But the Labor Department's guidelines provide, with respect to employer contributions for insurance, pensions, welfare programs and other similar benefits, that the employer will not be in violation if its contributions are the same for men and women or if the resulting benefits are equal. 41 CFR Section 60-20.3(c). The guidelines for the Equal Pay Act (see Appendix Q) are substantially the same. 29 CFR Section 800.116(d).

62 and male employees at age 65. In upholding the challenge--and in also ruling an employee's interest in his or her retirement plan was sufficiently important to allow a challenge to the plan in advance of retirement when it was believed to violate Title VII--the Court said (pg. 1189):

> A plain reading of the statute indicates that retirement plans which treat men and women differently with respect to their ages of retirement are prohibited. The plaintiff here, by virtue of the plan, is forced to give up three years of work together with the money she would have earned during that period. Such a forced retirement is tantamount to a discharge. Moreover, the classification of employees on the basis of sex is, of itself, contrary to the intent of Title VII.[4]

A like opinion was expressed in Rosen v. Public Service Electric and Gas Co., 477 F.2d 90 (3rd Cir. 1973),[5] where males were the plaintiffs. It appeared that under the company's original pension plan, male employees could retire at 65 with 25 years of service, with mandatory retirement at age 70, while female employees could retire at age 60 with 20 years of service, with mandatory retirement at age 65. The plan also provided for early retirement for male employees at the age of 60 upon completion of 30 years of service, but male employees taking this early retirement had their benefits reduced by a specified rate.

While the Rosen case was in the courts, the company and its union negotiated a new collective-bargaining agreement effective May 1, 1967, which, among other things, modified the pension plan by removing the differences in the optional and mandatory retirement ages for men and women. The modified plan also provided for early retirement for all employees at age 60, on a reduced pension, after 20 years of service, but female employees electing early retirement would not suffer any reduction in benefits on account of service prior to May 1, 1967. No similar provision was made for male employees electing early retirement.

The Court found that the revised plan still violated Title VII because it differentiated between men and women solely on the basis of sex, and it rejected the argument that the revised plan was valid because it resulted from collective bargaining.[6] As a remedy, the Court proposed that male employees who retired early after the effective date of Title VII and before May 1, 1967 should be compensated for reduced pensions they received simply because they were men and not women. It also held that the retirement credit of active male employees should be increased for the relevant period between the effective date of Title VII and May 1, 1967.

Similarly, in Chastang v. Flynn & Emrich Company, 365 F. Supp. 957 (Md. 1973) and 381 F. Supp. 1348 (1974), it was held that two retired male employees were discriminated against in violation of Title VII when they respectively retired in 1968 and 1969, and received only 50 percent of their vested interest in a retirement trust fund as opposed to the 100 percent of the vested interest a female employee in the same situation would have received.

And in Fitzpatrick v. Bitzer, 390 F. Supp. 278 (Conn. 1974), which considered a Connecticut statutory

4. Approval was also given to what is now 29 CFR Section 1604.9(f), which states that a difference in optional or compulsory retirement ages based on sex violates Title VII.

5. See also Rosen v. Public Service Electric and Gas Co., 409 F.2d 775 (3rd Cir. 1969), and 328 F. Supp. 454 (N.J. 1970), the case on appeal in 477 F.2d 90.

6. In Robinson v. Lorillard Corp., 444 F.2d 791, 799 (4th Cir. 1971), cert. dismissed, 404 U.S. 1006, 92 S.Ct. 573 (1971), it was said: "The rights assured by Title VII are not rights which can be bargained away--either by a union, by an employer, or by both acting in concert."

retirement scheme for state employees, it was said that here, too, retirement plans which treated men and women differently with respect to permissible ages for retirement and computation of benefits violated Title VII.

The problem of unequal monthly retirement contributions by male and female employees was at issue in Manhart v. City of Los Angeles, Department of Water and Power, 387 F. Supp. 980 (C.D. Cal. 1975). Female employees were granted a preliminary injunction enjoining their employer's practice of requiring them to make larger monthly retirement-plan contributions than males--notwithstanding the argument the practice was justified by actuarial tables showing that women as a class lived longer than men and were thus more likely to receive retirement benefits for a longer duration. The argument was faulted because the practice applied general actuarial characteristics of female longevity to individual female employees who in reality might or might not outlive individual male employees.

Clearly, seniority per se is a fringe benefit of employment, and if extended to males, must be extended to females in an equivalent employment situation. This principle was enunciated in Danner v. Phillips Petroleum Co., 447 F.2d 159 (5th Cir. 1971), where a female employee with ten years of service was discharged during a company economy drive because she had acquired no seniority and no bumping or bidding privileges (even though her male counterparts had such privileges). The Court said (pg. 163):

> A "policy" to limit company privileges to only one class of employees and to exclude others cannot survive in the name of "company policy" alone if the net effect of that policy is to exclude all women.

And in Privett v. Tri-State Container Corp., 368 F. Supp. 137 (E.D. Tenn. 1973), it was said that employers which lay off female employees while retaining males with less seniority commit an unlawful employment practice if the discrimination against such females is based on sex.[8] (It was also incidentally said that requiring women to stay at their posts while men were allowed to check out at a time-clock was improper, as was failing to provide a program of testing and training to enable women to gain experience with certain machines so they could compete with males for higher-paid jobs.)

Other, less tangible aspects of fringe benefits were involved in Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.C. 1973), where discrimination was found not only because female stewardesses were paid lower pensions than male pursers, but also because: (1) stewardesses who became pursers did not get credit for their stewardess seniority on the purser seniority list, whereas equivalent males who became pursers did get such credit; (2) stewardesses were required to share hotel rooms on layovers whereas their male counterparts were

7. The concept of "seniority" involves two bundles of rights. The first is concerned with increments in pay and fringe benefits an employee acquires through years of service, the second with competitive relationships between employees in terms of bumping and bidding privileges. The court cases have mostly involved the latter problem. See, for example, the subsequent appendix on Layoffs Pursuant to a Seniority System.

8. As to the problem of recently hired women being laid off because most males have more seniority in situations where there has also been a history of discrimination, see also, Layoffs Pursuant to a Seniority System, Appendix G.

not; and (3) stewardesses did not receive a "cleaning allowance" given to their male counterparts.

Another kind of "fringe benefit" problem was considered in Shipley v. Fisk University, ___ F. Supp. ___, 7 FEP Cases 244 (M.D. Tenn. 1973), where the issue was free rent to a male dean but not to a female dean. It was held that the denial of free rent to the female dean was not a form of improper compensation when the male dean was also a resident-hall director with extra duties sufficient to justify his rent-free status.

An even more tenuous concept of fringe benefits was somewhat at issue in Cupples v. Transport Insurance Co., 371 F. Supp. 146 (N.D. Tex. 1974), aff'd. 498 F.2d 1091 (5th Cir. 1974), where it was said an employer did not illegally grant special privileges to male employees by holding an annual golf tournament and stag for male employees when it was also planning a style show and luncheon for female employees at the same time.

Finally, in Rogers v. Equal Employment Opportunity Commission, 454 F.2d 234 (5th Cir. 1971), cert. den'd. 406 U.S. 957, 92 S.Ct. 2058 (1972), it was indicated that an employee's psychological as well as economic fringe benefits were protected by Title VII, and that this protection included the right to work in an environment not heavily charged with discrimination pressures.

APPENDIX G

SEX DISCRIMINATION IN EMPLOYMENT--LAYOFFS

PURSUANT TO A SENIORITY SYSTEM

In light of the recent economic climate, the problem of how to reconcile layoffs due to business conditions with the federally imposed requirements of nondiscrimination in employment has acquired increasing importance. In many institutions, traditionally, a "last hired, first fired" policy is in effect, either formally or informally, and if the particular employer has been unionized, the policy is most likely part of a collective bargaining agreement. In any event, if such seniority procedures operate, members of the discriminated-against group last hired are going to be predominant in the group first fired. Does seniority, therefore, defeat the intent of remedial legislation such as Title VII of the Civil Rights Act of 1964, as amended? Consideration of the question is complicated by the fact that Title VII itself, in Section 703(h),[1] provides in part that:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system * * * provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin * * *. (Emphasis supplied.)

The cases below which have considered the problem have generally involved minorities rather than women, but the principles drawn from them apply equally to women, and even though the cases involve unionized environments (with the exception of Loy v. City of Cleveland, infra, where layoffs were made pursuant to a modification of Civil Service Commission regulations), the principles drawn from them would apply, if there were a bona fide seniority system within the meaning of Section 703(h), to segments of a particular educational institution not actually unionized.

Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), though not involving layoffs, contains an extended discussion (pgs. 515-17) of the legislative history of the seniority provisions of Section 703(h), and the Court, after reviewing this history, said it indicated that a discriminatory seniority system established before the Act could not be held lawful under the Act, but that it also indicated Congress did not intend to require "reverse discrimination," that is, it did not intend that blacks be preferred over white employees who possessed employment seniority. It was also clear, the Court said, that Congress did not intend to freeze an entire generation of black employees into discriminatory patterns that existed before the Act. And nothing in the legislative history, or in Section 703(h) itself, the Court said, suggested that a racially discriminatory seniority system established before the Act was a bona fide seniority system under the Act.

In Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. den'd. 397 U.S. 919, 90 S.Ct. 926 (1970), another case which did not involve layoffs, it was said (pg. 988):

> It is not decisive * * * that a seniority system may appear to be neutral on its face, if the inevitable effect of tying the system to the past is to cut into the employees' present right not to be discriminated against on the grounds of race. The crux of the

1. 42 U.S.C.A. Section 2000e-2(h). See Appendix B.

problem is how far the employer must go to undo the effects of past discrimination.[2]

Later in the opinion the Court said (pg. 995):

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs. To begin with, requiring employers to correct their pre-Act discrimination by creating fictional seniority for new Negro employees would not necessarily aid the actual victims of the previous discrimination. There would be no guaranty that the new employees had actually suffered exclusion at the hands of the employer in the past, or, if they had, there would be no way of knowing whether, after being hired, they would have continued to work for the same employer. In other words, creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment. The clear thrust of the Senate debate is directed against such preferential treatment on the basis of race.

Watkins v. United Steel Workers of America, Local No. 2369, 369 F. Supp. 1221 (E.D. La. 1974), was the first case in which a court had to judge a seniority system from the standpoint of layoffs instead of promotions.

The plant involved in the litigation had been in operation for many years, but, with the exception of two blacks who were hired during World War II, only whites were hired until 1965. At the end of 1966, there were three blacks--including the original two--out of 410 hourly employees. The plant began hiring some blacks in 1967 and 1968, and hired blacks to a substantial degree in the years 1969, 1970 and 1971. At one point in 1971 there were, according to the evidence, over 50 blacks among a total of 400 hourly employees.

Beginning in 1971 and continuing through 1974, there had been a substantial cutback in employment at the plant. (By April of 1973 there remained only 152 hourly employees.) Pursuant to the terms of the union contract, whenever there had to be a cutback in employment, layoffs were to be made on the basis of total employment seniority. The last man hired would be the first to be laid off and laid-off employees would be placed on a recall list and re-employed, as needed, in the reverse order of the layoffs--i.e., the most senior employee on recall would be the first to be re-employed. As a result of following these procedures, all the black employees hired after 1965 had been laid off, and the plant's present work force was all white, apart from the two blacks hired during World War II. Moreover, the first 138 persons on the recall list were white. Accordingly, the Court said, if the recall procedures established by the contract were valid, the plant could not be expected to employ another black for many years.

The Court then considered two lines of cases, one consisting of cases striking down departmental seniority systems on the ground that blacks hired into less desirable departments under old discriminatory practices and who then transferred into a more desirable department would lose their accumulated seniority and be junior to

2. The court then discussed three different theories of employer action (as developed in Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harvard Law Review 1260 (1967)), "freedom now," "rightful place," and "status quo." Under the "freedom now" concept, an employer would immediately give blacks with more plant seniority the jobs of whites with less plant seniority but with more job or departmental seniority. A "rightful place" theory would prohibit the future awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. Under it, the Court said, white incumbent workers should not bumped out of their present positions by blacks with greater plant seniority, and plant seniority should be asserted only with respect to new job openings. Under the "status quo" concept, an employer could satisfy the requirements of the Act merely by ending explicit racial discrimination, but it would not have to correct the effects of past discrimination.

whites who had been hired later but who had been in the department longer, and the other involving unions which gave priority in work referrals to those with long work experience under the bargaining contract, where blacks had been excluded from such work.

These two sets of cases, the Court said, shared a single principle: employment preferences could not be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority. And the same principle, it said, invalidated the layoff and recall rules in the present case. Accordingly, it issued--after giving the parties an opportunity to confer--a remedial order[3] which directed the employer, without laying off any incumbent employee, to recall enough blacks to restore the racial percentage of the work force that existed as of the date the last new employee was hired. If future layoffs had to be made, they were to be allocated between white and black employees so that the ratio of blacks to whites would remain unchanged. (Watkins is on appeal to the Fifth Circuit and was argued in January, 1975.)[4]

In Loy v. City of Cleveland, ___ F. Supp. ___, 8 FEP Cases 614 (N.D. Ohio 1974), female police officers obtained a temporary restraining order against the city of Cleveland, which was planning two days later to lay off 89 officers, 13 of whom would be women, because of financial problems. In effect, this would mean that while 87 percent of the women hired in 1973 would be laid off, only 42 percent of the men hired in that year would be laid off--even though women constituted only 8 percent of those hired in 1973 and only 1.9 percent of the total police force. In view of the disparate effect on women and the likelihood the plaintiffs would be able to show a history of discrimination against female applicants, the Court, relying on Watkins, ordered that those laid off be not more than 8 percent female. (The case was subsequently mooted when the city abandoned the layoff, 8 FEP Cases 617).

In another case influenced by Watkins, Delay v. Carling Brewing Co., ___ F. Supp. ___, 10 FEP Cases 164 (N.D. Ga. 1974), it was said that affirmative action was required to redress racial discrimination resulting from layoffs on a seniority basis.

In Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), the first appellate decision on the issue of discrimination in layoffs based on seniority, a "last hired, first fired" seniority system for bricklayers which gave full credit to all bricklayers for their actual length of service was upheld, as against the claim it would perpetuate the effects of past discrimination (since blacks would be laid off before and recalled after certain whites who might not otherwise have had seniority had the employer not discriminated in hiring prior to 1964).

3. 8 FEP Cases 729 (1974).

4. Watkins was criticized in Cox v. Allied Chemical Corp., 382 F. Supp. 309 (M.D. La. 1974), because the Watkins court had not required a showing that individual blacks had been prevented from acquiring the necessary seniority "by virtue of" prior discrimination, but instead had imposed an absolute quota system on the plant.

The Court said (pgs. 1319-20):

> Title VII mandates that workers of every race be treated equally according to their earned seniority. It does not require as the Fifth Circuit said, that a worker be granted fictional seniority or special privileges because of his race.
>
> Moreover, an employment seniority system is properly distinguished from job or department seniority systems for the purposes of Title VII. Under the latter, continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service. Under the employment seniority system there is equal recognition of employment seniority which preserves only the earned expectations of long-service employees.
>
> Title VII speaks only to the future. Its backward gaze is found only on a present practice which may perpetuate past discrimination. An employment seniority system embodying the "last hired, first fired" principle does not of itself perpetuate past discrimination. To hold otherwise would be tantamount to shackling white employees with a burden of a past discrimination created not by them but by their employer. Title VII was not designed to nurture such reverse discriminatory preferences. (Emphasis supplied.)

Sex discrimination in layoffs, not racial discrimination, was alleged in Jersey Central Power and Light Co. v. Local Unions 327, 749, 1298, 1303, 1309 and 1314 of the International Brotherhood of Electrical Workers, ___ F.2d ___, 9 FEP Cases 117 (3rd Cir. 1975). In effect, Jersey Central reached the same conclusion as Waters, but there was an additional factor in Jersey Central not present in either Waters or Watkins.

It appeared that the company had signed an EEOC conciliation agreement, also signed by the unions with which the company dealt, designed to settle certain claims of discrimination and obligating the company to use its best efforts to increase the percentages of female and minority employees in its work force over a five-year period to the percentages that these groups represented in the relevant labor market. The question was, did this conciliation agreement supercede an earlier collective bargaining agreement which included a "last hired, first fired" system for determining layoffs?

The Court, influenced by the absence of seniority or layoff provisions in the EEOC agreement, particularly in view of the EEOC's unsuccessful attempts to include such clauses, answered the question in the negative, and then went on to say (pgs. 128-9):

> Our reading of Title VII reveals no statutory proscription of plant-wide seniority systems. To the contrary, Title VII authorizes the use of "bona fide" seniority systems * * *. While the legislative history of Title VII is largely uninstructive with respect to seniority rights, it is evident to us that Congress did not intend that a per se violation of the Act occur whenever females and minority group persons are disadvantaged by reverse seniority layoffs.[5]

SUMMARY

Two Circuit Courts, the Third and the Seventh, have said, in effect, that Section 703(h) permits an employer to lay off employees pursuant to a plant-wide "last hired, first fired" bona fide seniority system even if such a system perpetuates past sex-discriminatory practices. The Fifth Circuit, in Watkins,[6] is about to rule on the

5. In Bales v. General Motors, ___ F. Supp. ___, 9 FEP Cases 234 (N.D. Cal. 1975), female employees were denied a preliminary injunction to prevent their layoff pursuant to a seniority system where, among other things, a claim by the employer and the union that the seniority system was bona fide made it difficult to say the plaintiffs would prevail on the merits.

6. And also in Dawkins v. Nabisco, Inc., ___ F. Supp. ___, 7 FEP Cases 535 (N.D. Ga. 1973).

same issue, and undoubtedly the issue will proceed in due course to the Supreme Court.

Even given the holdings of the Third and Seventh Circuits, there is at present no case law on whether an informal or unwritten but consistently-followed "last hired, first fired" seniority system (as opposed to one formalized by an employer-union contract or incorporated in Civil Service or similar regulations) would qualify as bona fide for purposes of excepting layoffs from sex-discrimination charges pursuant to Title VII.

APPENDIX H

SEX DISCRIMINATION IN EMPLOYMENT--NEPOTISM

In Lewis v. Spencer, 468 F.2d 553 (5th Cir. 1972), a case which arose prior to the time Title VII applied to educational institutions, a female biology teacher at a public junior college brought an action under 42 U.S.C.A. Section 1983[1] challenging the action of the college in not rehiring her for the 1969-70 school year because of a newly adopted policy that a husband and wife could not teach in the same department. The power of the college to adopt a policy forbidding husband and wife from teaching in the same department was apparently not in issue, since the plaintiff had conceded the validity in general of such policies, but the case is mentioned here for what it has to say about the rationale generally underlying such rules (pgs. 554-5):

> There is evidence that other colleges and universities have similar policies, some even forbidding any concurrent employment of two spouses in the college or university, whatever their assignments. Some of the undergirding reasons given for such policies are to discourage nepotism and favoritism, prevent emergence of disciplinary problems, inhibit personal and professional cliques in which husband and wife will side with each other, and prevent one spouse's frequently taking the teaching assignment of the other.

The Fifth Circuit remanded the case for consideration of whether the adoption of the policy, without a recognition therein of the plaintiff's and her husband's unique situation (viz., recently married and the only couple in the school to whom the policy was applicable) through such a device as a grandfather clause or prospective application, would make impermissible as applied to her an otherwise constitutionally valid policy.[2]

In Harper v. Trans World Airlines, Inc., 385 F. Supp. 1001, (E.D. Mo. 1974), a Title VII action, it appeared that the plaintiff, a female, was first employed by TWA in 1969 as a telephone sales agent in its Reservations department. In 1970, she met her future husband, also an employee in the same department, and married him in May, 1971.

TWA had a policy which did not permit relatives, including a husband and wife, to work in the same department. Pursuant to this policy, the plaintiff had been told that, following her marriage, either she or her husband would have to transfer out of the department, take a leave of absence, or resign. But neither made any election, and TWA therefore terminated the plaintiff.

Based on the evidence, the Court found that a number of opportunities for potential work conflicts existed when relatives were employed in the same department, and since the Reservations department operated around the clock, 365 days a year, employees were always concerned with what shift they might be assigned to, as well as with what days off they might be allotted. Accordingly, if a husband and wife were employed in the same department, they would naturally attempt to arrange similar working schedules and, if they were unable to do so because of company needs, this might have an adverse effect upon their performance or

1. See Appendix A-1.

2. On remand, in 369 F. Supp. 1219 (S.D. Tex. 1974), aff'd. 490 F.2d 93 (5th Cir. 1974), the trial court found against the plaintiff.

cause inconvenience to the company in attempting to accommodate their requests. Promotional situations, the Court noted, also presented another potential area of conflict, and finally, the close proximity in which employees worked in the Reservations department might prove distracting because it afforded ample opportunity to discuss personal matters and other family problems. In upholding the policy, the Court said (pg. 1003):

> The Court finds that the policy was not designed to discriminate against men or women and, in fact, it did not have such effect. The policy was enacted to achieve legitimate business purposes and objectives and represented what defendant TWA considered effective measures taken to obtain these objectives, i.e., effectiveness of employee performance, and not for any discriminatory purpose or design forbidden by the act.

In Sanbonmatsu v. Boyer, ___ N.Y. Supp.2d ___, 8 EPD P9704 (N.Y. A.D. 1974), a case brought under New York's Human Rights Law, it appeared the plaintiff and her husband were speech professors at a state university. A so-called nepotism rule prohibited certain relatives, including the husband or wife, of any member of the academic or nonacademic staff of any college from appointment to any position at the same college. As a result, the plaintiff had been denied a "term" appointment to the staff since her marriage, although she had been employed regularly on a "temporary" appointment. Because of the nature of these "temporary" appointments, extending over a period of five years, she had been denied fringe benefits and tenure rights, and when she subsequently applied for a maternity leave (a benefit accorded to "term" appointees), her services were terminated.

In striking down the nepotism rule, the Court pointed out that, although there had been 27 nepotism cases at the state university, in none of these had the husband been required to accept a temporary appointment. The husband always received a term appointment and the wife either was temporary or obtained a waiver which permitted her to receive a term appointment. In some cases the rule had been waived when the university sought to attract a "star" professor and his wife also wanted to work. Citing these and other examples of uneven application of the rule, the Court found that it unlawfully discriminated against women.

APPENDIX I

SEX DISCRIMINATION IN EMPLOYMENT--GROOMING

To date, the cases alleging sex discrimination in employment because of grooming or lifestyles have been brought by males, and generally the courts have held that the employer-acts complained of do not constitute sex discrimination.

In Roberts v. General Mills, Inc., 337 F. Supp. 1055 (N.D. Ohio 1971), however, a male employee of a food processor brought a Title VII action on the ground the employer, by its rule that men wear hats and women wear hairnets, and by refusing him permission to wear a hairnet, had deprived him of equal employment opportunities. The Court, in denying the employer's motion for summary judgment, said (pg. 1057):

> This case is quite similar to the "protective" law cases. The upshot of the "protective" laws is the exclusion of women from certain positions on a generic basis by stating that they are not physically or biologically suited for such employment. Apparently, this is a carry-over of the stereotype that females are the weaker sex. * * * The further test * * * is * * * whether the rule is made on an individual basis or on a generic stereotype basis. In this case it was obviously the latter.[1]

Beards and hair length were involved in Rafford v. Randle Eastern Ambulance Service, Inc., 348 F. Supp. 316 (S.D. Fla. 1972). The Court, stating that it was a fundamental principle of Title VII that an employer could not apply a hiring or retention standard to one sex but not the other, said the dismissal of long-haired males could obviously be equated to refusing to hire an individual based on stereotyped characterizations of the sexes. But the firing of males who refused to shave their beards, the Court said, was another matter, and it rejected the plaintiffs' claim that discharge for failure to shave off facial growth, admittedly a special male characteristic, discriminated against them because of their sex. The thrust of the plaintiff's argument was that males who do not shave cannot work, while females who do not and need not shave are allowed to work. But in reply, the Court said that the discrimination was in favor of men who shaved off their beards and mustaches, and that this did not involve proscribed sex discrimination.

In Fagan v. National Cash Register Co., 481 F.2d 1115 (1973), it was held that the requirement by an employer that technical service employees, whose duties included visiting offices of the employer's customers for the purpose of servicing and repairing the employer's equipment, keep their hair neatly trimmed and combed and that the hair taper down the back of their head and terminate above the collar, did not constitute

1. In Lindquist v. City of Coral Gables, 323 F. Supp. 1161 (S.D. Fla. 1971), an action was brought under 42 U.S.C.A. Sections 1981, 1985, and 1985(3) (See Appendix A-1) to challenge a rule of a fire department which prohibited members from wearing sideburns extending below their ear lobes. The defendants argued that the fire department was a paramilitary organization in which disobedience could not be tolerated and that the plaintiff's failure to obey his superiors' instructions regarding sideburns justified his dismissal. In addition, they argued that lengthy sideburns constituted a serious physical danger because hair was highly flammable, and that lengthy sideburns could not be allowed because they prevented a satisfactory seal on gas masks. But the evidence showed that the length of the plaintiff's sideburns did not actually interfere with the wearing of any required equipment, and also that the defendants had never conducted any tests to determine what length sideburns should be permitted to be worn by firefighters. Finding that the regulation was unreasonable, the Court ordered the plaintiff reinstated with full retroactivity of tenure, status, and salary.

sex discrimination prohibited by Title VII, even though the employer, which had no female technical service employees, assertedly had no policy with regard to the manner in which women employees had to wear their hair.

In Willingham v. Macon Telegraph Publishing Co., 482 F.2d 535 (5th Cir. 1973), an employer's grooming code requiring different hair lengths for male and female job applicants and employees was said to discriminate on the basis of sex within the meaning of Title VII, despite the contention both sexes were treated equally in that all applicants and employees were required to groom their hair according to the prevailing community standard. But since a grooming code requiring different hair lengths for male and female job applicants might be justifiable as a bona fide occupational qualification, the Fifth Circuit remanded the case for the taking of evidence on the BFOQ defense.

Subsequently, however, the Fifth Circuit granted a petition for rehearing, the decision on which was handed down in Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, (5th Cir. 1975). The new decision vacated the remand and held that a hiring policy that distinguished between men and women on the basis of grooming policy or the length of their hair was related more closely to the employer's choice of how to run its business than to equality of employment opportunity, since the distinction was based upon something other than immutable or protected characteristics. To like effect, and decided slightly earlier, are Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974), and Morris v. Texas and Pacific Railway Co., ___ F. Supp. ___, 9 FEP Cases 81 (M.D. La. 1975).

An employer's rule, however, forbidding welders from wearing beards was upheld in Dripps v. United Parcel Service of Pennsylvania, Inc., 381 F. Supp. 421 (W.D. Penn. 1974), as a sound, bona fide occupational qualification based on reasonable concern for safety, and showing no discrimination based on sex.

APPENDIX J

SEX DISCRIMINATION IN EDUCATIONAL EMPLOYMENT

Some of the cases in this appendix have appeared in other appendices, but cases cited in Appendix E and dealing with the maternity or pregnancy policies of educational institutions are excluded entirely here, as are cases in Appendix Q dealing with pay differentials between male and female custodial employees of educational institutions.

For convenience, the cases are arranged by the three topics of Hiring, Promotion, and Termination, but the applicable principles are generally the same.

HIRING

In Van De Vate v. Boling, 379 F. Supp. 925 (E.D. Tenn. 1974), a female who failed to get a job as a music teacher with the University of Tennessee brought an action under 42 U.S.C.A. Sections 1981 and 1983[1] (hereafter referred to in this appendix as Sections 1981 and 1983) for monetary damages against an agent of the university and for injunctive relief against the university itself. She had taught in the music department part time at the beginning of 1967, worked on her doctorate during most of the remainder of 1967, and taught at another college during the academic year 1968-9. In November, 1969, she applied to the university for a permanent job and was told there were no openings. She alleged this refusal to hire her was a discrimination based on sex, while the university alleged and produced evidence to the effect that the refusal was based on personality clashes.

In finding for the defendant, the Court expressed sentiments certain to be heard more and more frequently as this type of educational dispute is adjudicated (pg. 929):

> It is not a court's prerogative to interject itself into the educational institution and to require such institution to either hire or not hire a professor. While such an institution cannot be permitted to refuse employment on unlawful and impermissible grounds, its exercise of discretion in refusing to hire an applicant because it is felt that such person could not harmoniously perform his or her duties should not be disturbed by a court in an action of this character.[2]

In O'Connell v. Teachers College, 63 F.R.D. 638 (S.D. N.Y. 1974), an action brought under Sections 1981 and 1983 and under Title VII, the female plaintiff applied for a position as an assistant professor of speech communication and was interviewed for the position along with another woman and a man. The man

1. See Appendix A-1.

2. The Commonwealth Court of Pennsylvania, in Slippery Rock State College v. Pennsylvania Human Relations Commission, 314 A.2d 344 (1974), overturned a decision of the state Human Relations Commission directing a college to offer a contract of employment as a full-time assistant professor of English to a teacher who claimed she had been discriminated against on the basis of sex. The evidence showed she had been frequently notified she would have to get her doctorate if she wanted full-time employment. To the argument that the requirement for a doctorate was a sham, intended to hide sex discrimination, the Court said that while reasonable minds might differ as to whether the English Department should have a policy requiring an otherwise qualified teacher to have a doctorate as a condition to full-time employment, particularly when other departments in the college did not have such a requirement, the establishment of such a policy was nevertheless the prerogative of the executive and administrative officers of the college.

was hired and the defendants alleged, in response to the charge of discrimination based on sex, that he was hired because he was the best qualified candidate. The case contained no decision on the merits, but the Court granted a motion for summary judgment as to the claim under Section 1981 because, it said, Section 1981 applied only to racial discrimination.

In Gresham v. Chambers, 501 F.2d 687 (2nd Cir. 1974), a Section 1983 action,[3] a black female faculty member sued to enjoin the president of her college from appointing a nonfaculty white female as an associate dean. The principal issue was whether the president must, in exercising the power to appoint members of his staff at the level of associate dean, use open recruiting as the method of selection. The plaintiff alleged that the president, by selecting the white female through informal word-of-mouth methods, had precluded the plaintiff from being selected.

The evidence showed that in the latter part of 1972, the college president had decided to expand his staff to include a woman as associate dean so as to give more female representation at the administrative level. The president considered seven women and ultimately, without engaging in public recruiting or obtaining the faculty's approval, appointed a wife of a member of his vice-president's staff. The evidence also showed that 5 percent of the county in which the college was located was black, 3.6 percent of the 18,000 students were black, and 9.8 percent of the 450 faculty members were black.

Under these facts, the Second Circuit upheld the trial court's denial of preliminary relief, saying that only upon a showing of unlawful past discrimination will formal open recruiting or some other recruiting method be mandated in lieu of word-of-mouth recruiting.[4]

PROMOTION

In Green vs. Board of Regents of Texas Tech University, 335 F. Supp. 249 (N.D. Tex. 1971), aff'd. 474 F.2d 594, reh. den'd. 475 F.2d 1404 (5th Cir. 1973), a Section 1983 action, the evidence showed that the plaintiff, an associate professor of English who had been teaching almost twenty-five years at Texas Tech, had been applying periodically since 1962 for appointment to full professor. At the trial she produced statistical evidence to support her allegations of a pattern of discrimination against women in the employment practices of the English Department, as well as evidence of her professional competence and achievements. But the testimony produced by the defendant demonstrated that the decision not to promote the plaintiff, at each stage of the review process, had been made solely on her record, with no thought being given to her sex. In dismissing the complaint, the Court said (pg. 250):

> The criteria for promotion to full professor are especially exacting, as that is the highest faculty status which can be awarded by a university. The Court finds that these

3. Section 1981 was also involved. See Appendix A-1.

4. In League of Academic Women v. Regents of University of California, 343 F. Supp. 636 (N.D. Cal. 1972), it was held that an action to prevent alleged discriminatory hiring and other employment practices based on sex could not be brought under Section 1981, and that in an action for equitable relief, the Regental Corporation and individual regents were "persons" within the meaning of Section 1983.

> criteria are reasonable, that they bear a rational relationship to the duties of a full professor, and that they were reasonably applied in this case. * * * It is indisputed that such evaluations are necessarily judgmental, and the Court will not substitute its judgment for the rational and well-considered judgment of those possessing expertise in the field.

In Braden v. University of Pittsburgh, 477 F.2d 1 (3rd Cir. 1973), the lower court had dismissed a Section 1983 action by a female assistant professor alleging discrimination by the university against women in professional positions, the ground of dismissal being there was insufficient state involvement to invoke Section 1983. The fact, the lower court had said, that there were state-appointed trustees on the private university's governing board, that the state contributed approximately one-third of the university's annual budget, and that the university's bonds were exempt from state taxation (all of which incidents of state involvement had been mandated by a 1966 statute) still was not sufficient to endow the university with the attributes of a state agency.

In reversing and remanding, the Third Circuit noted that the 1966 statute seemed to provide that 15 of the 36 trustees would be representatives of the state, and that there was no information in the record to indicate how the trustees actually functioned, what their tenure was, and how they were paid for their services. Also cited was a section of the 1966 statute, not discussed by the lower court or counsel, which provided that the university was to be an "instrumentality" of the state's system of higher education. The use of the word "instrumentality" suggested agency, the opinion said, and accordingly there should be a development of the record on that point.

In Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Penn. 1974), an action brought under 42 U.S.C.A. Section 1985(3),[5] Section 1983, and Title VII, a female assistant professor of English at the University of Pennsylvania, a state-aided institution, alleged she had been denied promotion and tenure because of her sex. In response to a motion to dismiss, the Court held that the plaintiff had a cause of action under each of the three theories (but not under Executive Order No. 11246, which was also involved).

As to Section 1985(3), the Court held that it protected against invidious conspiracies based on gender, and that the alleged discrimination by the university and some of its employees was in fact a conspiracy and not a single act of discrimination by a single business entity.

As to Section 1983 and the question of whether the University was acting under color of state law, the Court said there were five factors to consider in this type of case:

1. The degree to which the "private" organization is dependent on governmental aid.
2. The extent and intrusiveness of the governmental regulatory scheme.
3. Whether the scheme connotes governmental approval of the activity or whether the assistance is merely provided to all without such connotation.
4. The extent to which the organization serves a public function or acts as a surrogate for the state.
5. Whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Each of these factors is material, the Court said, and no one factor is conclusive, but after reviewing

5. See Appendix A-1.

in terms of the enumerated factors, the background of university-state relations, state appropriations to the university, state financing of university buildings, and related matters, it found the necessary "state action" to exist.

As to Title VII and the argument it did not apply because the alleged acts of discrimination which were the gravamen of the complaint had occurred prior to March 24, 1972, the date Title VII became applicable to educational institutions, the Court said (pg. 1006):

> It is true that Dr. Rackin was denied promotion and tenure * * * well before March 24, 1972. However, her employment at the University has continued and in her amended complaint she has alleged that her discriminatory treatment has continued and that she still experiences the effects of the University's earlier discriminatory conduct in regard to, inter alia, her pay, her being deprived of teaching courses in her area of scholarly specialization and the unprecedented requirements set by the University for her being readmitted and reconsidered for promotion and tenure * * *. The law is quite clear that relief may be granted under Title VII to remedy present and continuing effects of discrimination which occurred prior to the effective date of the Civil Rights Act of 1964. (Second emphasis supplied.)

TERMINATION

In Shipley v. Fisk University, ___ F. Supp. ___, 7 FEP Cases 244 (M.D. Tenn. 1973), a Title VII action, the plaintiff's allegation she had been terminated as dean of women because of sex discrimination was successfully rebutted by evidence of her absenteeism, tardiness, inability to deal with the needs of the students, and lack of the educational requirements needed in a reorganized student personnel office.

Johnson v. University of Pittsburgh, 359 F. Supp. 1002 (W.D. Penn. 1973), was the first case in which a preliminary injunction was granted to an academic woman under Title VII. The plaintiff had been employed in 1967 for three years as an assistant professor without tenure in the school of medicine. In 1970, the appointment was renewed for an additional three years, but in January, 1972, the plaintiff was notified her employment was going to be terminated. She sought a preliminary injunction restraining her discharge until the determination of her action under Title VII, and in support of the injunction, produced evidence that the medical school had granted tenure after seven years to a male professor, applying different standards than those which were applied to herself although each of them taught some of the same courses and had substantially the same evaluation as a lecturer, that the medical school consistently paid less compensation to the plaintiff than it paid to male members of the faculty, and that the medical school had consistently granted tenure to men employees and not granted it to women employees. In addition, she produced evidence of damage to her professional reputation, impairment of her ability to get a job, and an adverse effect upon a grant which had been given to the medical school for research to be done by her. The Court, finding a strong likelihood of her success on the merits, granted the injunction.

(The defendant had also argued that since the plaintiff was notified in January, 1972 of her discharge, to be effective in June, 1973, the discharge and failure to give her tenure were completed acts before March 24, 1972, the date educational institutions came within the ambit of Title VII. The Court held, however, that the 1972 amendments could not be rendered nugatory by making a decision before March 24, 1972, to become effective thereafter as a discriminatory discharge, and that a refusal to grant tenure thereafter was as much a violation of Title VII as any other sexual discrimination.)

In Faro v. New York University, 502 F.2d 1229 (2nd Cir. 1974), a Title VII action, a female Ph.D. in anatomy also sought a preliminary injunction, in this case to restrain the New York University Medical Center from terminating her.

The evidence showed that the plaintiff had come to the medical center in 1965 as one of some fourteen members of a research staff whose work was funded by special funds. Due to funding problems in 1971 and 1972, the plaintiff and other employees were offered new appointments without tenure possibilities but with continuation of their current salary and fringe benefits. The plaintiff, considering this a demotion, requested consideration for a tenured position which, she was subsequently advised, the university's financial and academic situation precluded. Its financial condition, in fact, forced it to terminate the plaintiff's employment at the end of 1973.

At the hearing on the preliminary injunction, there had been evidence of the hiring of other medical professors who were male, but the evidence, the Circuit Court said, showed no professional comparison between these professors, their experience, skills, and the purposes for which they were hired, and the plaintiff. In upholding the denial of the application for a preliminary injunction, the Court said (pg. 1231-2):

> Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision. * * *
>
> In practically all walks of life, especially in business and the professions, someone must be charged with the ultimate responsibility of making a final decision--even as are the courts. The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring or promotion.[6]

In Jaroch v. Board of Regents, University of Wisconsin System, 372 F. Supp. 106 (E.D. Wisc. 1974), a case brought under Section 1983 and Title VII, a female college teacher alleged that her imminent termination was the result of sex discrimination and asked for a temporary restraining order to enjoin her university employers from removing her from her job. The request was denied because she had not yet been terminated, she had not suffered loss of pay or benefits, and before the termination could become effective she was entitled to an administrative hearing at which there were appropriate provisions for due process. In addition, the university chancellor would review the results of the administrative hearing, the board of regents would review the chancellor's findings, and ultimately judicial review would be provided by the Wisconsin statutes.

In Pendrell v. Chatham College, ___ F. Supp. ___, 9 FEP Cases 10 (W.D. Penn. 1974), it was held that a female

6. Another court, in considering this same question of judicial noninterference in a related area--alleged sex discrimination in the hiring practices of a law firm--said: "There is no doubt that hiring a professional requires weighing many subjective factors contributing to the applicant's qualifications as a whole, above and beyond the more objective academic qualifications. We cannot agree, however, that this fact immunizes discriminatory practices in professional fields from attack on a class basis. * * * Put another way, although a law firm is undoubtedly free to make complex, subjective judgments as to how impressive an applicant is, it is not free to inject into the selection process the a priori assumption that, as a whole, women are less acceptable professionally than men." Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D. N.Y. 1973).

professor of anthropology could bring an action for nonrenewal of her contract of employment against a private college under 42 U.S.C.A. Section 1985(3). In an earlier decision in the same case, 370 F. Supp. 494 (1974), the Court had refused to entertain a Section 1983 action because the defendant was a private college and there was no state involvement.

In McRae v. Goddard College, ___ F. Supp. ___, 10 FEP Cases 143 (Vermont 1975), it was held that the defendant college did not violate Title VII when it refused to renew the contract of a black college counselor who had participated in illegal and disruptive occupations of the college president's office and who had refused to discuss standards of conduct appropriate to college employees, since (1) the counselor had failed to show that he was subjected to different treatment because of his race or that his employment dispute was predicated on his race, and (2) the counselor's conduct justified his termination. Additionally, it was held that the college did not violate Section 704 of Title VII[7] when it refused to renew his contract after the illegal and disruptive occupations of the president's office, allegedly to protest the racially exclusionary nature of the college's Third World Program, since (1) there was no evidence to support the contentions that a minority-group professor on whose behalf the counselor had protested was terminated because of his race or color, or that the counselor's termination was related to his activities on behalf of the professor in question, and (2) if the counselor had actively protested the exclusionary aspect of the Third World Program, his termination was related to that protest.[8,9]

MISCELLANEOUS

In Kaplowitz v. University of Chicago, 387 F. Supp. 42 (N.D. Ill. 1974), a Title VII action, women graduates of the law school alleged that the law school, through its placement service, maintained a policy of allowing employers which the school knew or should have known engaged in discrimination against women to use its facilities to interview and otherwise seek to hire law students and graduates of the school. The Court said the law school was "an employment agency" within the meaning of Title VII, but

7. Section 704 makes it an unlawful employment practice to discriminate against an employee because the employee opposed or protested an employment practice prohibited by Title VII. See Appendix B.

8. In a Section 1983 case not directly involving sex discrimination (though one guesses there was a double standard hidden somewhere in the woodpile), Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973), a middle-aged divorced high-school teacher who had been advised by her school board's secretary it was permissible to have overnight guests in her one-bedroom apartment since public accommodations in the rural community were limited, was discharged for having such overnight guests as a male contemporary of her twenty-six year-old son. The lodging of such guests, it was held, did not provide a basis for the school board's inference there was a strong potential for sexual misconduct, and therefore that her activity was social misbehavior not conducive to the integrity of the school system. Reinstatement was ordered.

9. In Burton v. Cascade School District Union High School No. 5, 353 F. Supp. 254 (Ore. 1973), aff'd. 512 F.2d 850 (9th Cir. 1975), another Section 1983 case not involving sex discrimination, a female homosexual was discharged under an Oregon statute authorizing dismissal for "immorality." The standard was held unconstitutionally vague and also lacked any nexus between conduct and teaching performance. Damages and attorney's fee were allowed, but reinstatement was denied.

that when it had not permitted any firm to designate which students it wanted to interview and required each firm to interview all students who signed up for interviews without regard to sex, it could not be required to make a determination as to whether particular firms engaged in discrimination, nor could it be required to prohibit those firms from interviewing at the school since the school performed its duty once it legally referred all prospective employees, including women, to the law firms.

APPENDIX K

SEX DISCRIMINATION IN EDUCATION--ADMISSIONS

Twice at the beginning of the nineteen-sixties, women brought state-court actions to compel all-male Texas A. & M. to admit female students. At the time, the Texas system of higher education was comprised of 18 institutions, each of which, with the exception of A. & M. and Texas Women's University, was open to both sexes.

The first case, Heaton v. Bristol, 317 S.W.2d 86 (Texas 1958), cert. den'd. 359 U.S. 230, 79 S.Ct. 802 (1959), involved women who wanted to attend A. & M. principally because they lived in the community in which it was located. The second case, Allred v. Heaton, 336 S.W.2d 251 (Texas 1960), cert. den'd. 364 U.S. 517, 81 S.Ct. 293 (1961), involved women who desired to attend A. & M. not only because it would be more convenient but also it would be less costly than attendance at any other school. In both cases, the Texas Court of Civil Appeals held that the plaintiffs' constitutional rights had not been violated by their exclusion.

But in early 1970, women managed to gain admission to the all-male University of Virginia at Charlottesville. Kirstein v. The Rector and Visitors of the University of Virginia, 309 F. Supp. 184 (E.D. Va. 1970).

In Kirstein the evidence showed that the education offered at the University of Virginia at Charlottesville was of higher quality than at other state-supported universities and colleges and branches of the University of Virginia elsewhere, and that at Charlottesville there was a "prestige" factor not available at other Virginia institutions. Citing these facts, the Court said Virignia could not, in view of the equal protection clause, deny to women, on the basis of sex, educational opportunities at Charlottesville not afforded in other institutions operated by the state, but it specifically declined to go further and hold that Virginia could not operate any educational institution separated according to the sexes.

Later that same year, men tried to gain admission to all-female Winthrop College, a state-supported institution in South Carolina, but failed to do so. Williams v. McNair, 316 F. Supp. 134 (S.C. 1970), aff'd 401 U.S. 951, 91 S.Ct. 976 (1971).

In Williams, however, there was no evidence to suggest there was any special feature connected with Winthrop which would have made it more advantageous educationally to the male plaintiffs than any number of other state-supported institutions, and the plaintiffs could name no courses peculiar to Winthrop in which they wished to enroll, although some plaintiffs established it was more convenient geographically to their homes.[1] Citing these matters, the Court said it could not declare as a matter of law that a legislative classification, premised on respectable, pedagogical opinion, was without any rational justification and violative of the equal protection clause.[2]

1. One wonders whether the presence as plaintiffs of female students attending Winthrop might have made a difference to outcome.

2. Separate actions by Congressmen Edwards and Waldie of California to have women admitted to the Air Force and Naval Academies were consolidated in Edwards v. Schlesinger, 377 F. Supp. 1091 (D.C. 1974), rev'd. and remanded for trial on merits, 509 F.2d 508 (D.C. Cir. 1974). The lower court had said the refusal of the two academies to consider females for appointment did not deny equal protection, in that such a policy was reasonably related to furthering a legitimate governmental interest of preparing young men to assume leadership roles in combat.

In Bray v. Lee, 337 F. Supp. 934 (Mass. 1972), the plaintiffs were a group of girl students who took an examination in early 1970 for admission as seventh-grade students to the Girls Latin School in Boston the next fall. On the examination, they scored from 120 to 133, and, nevertheless, were not admitted in the fall of 1970. Boys, however, who applied for admission to Boys Latin School for the same academic year were admitted if they made a score of 120 or better out of 200 possible points. The plaintiffs alleged they had been denied equal protection because girls with scores from 120 to 133 were excluded from Girls Latin while boys with the same scores were admitted to Boys Latin. Because the plaintiffs were all eighth-grade students by the time the case was ready for disposal, they asked to be admitted to Boston Latin the next September as ninth-grade students.[3]

If the school administration had not used separate cutoffs for boys and girls, but instead had used one cutoff for both boys and girls measured by the total number of seats available in September 1970, the merged cutoff would have been a score of 127, and the Court, in finding for the plaintiffs, ordered that all of them who had scored 127 or better be admitted to Boston Latin as ninth-grade students the next fall. The Court concluded by saying (pg. 937):

> I rule that the use of separate and different standards to evaluate the examination results to determine the admissibility of boys and girls to the Boston Latin schools constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment, the plain effect of which is to prohibit prejudicial disparities before the law. This means prejudicial disparities between all citizens, including women or girls. I further find * * * female students seeking admission to Boston Latin School have been illegally discriminated against solely because of their sex, and that discrimination has denied them their constitutional right to an education equal to that offered to male students at the Latin School.[4]

A similar problem (though it arose not from seating capacities of two buildings but rather from a school-district policy) was considered in Berkelman v. San Francisco Unified School District, 501 F.2d 1264 (9th Cir. 1974). The plaintiffs, all girls, challenged the school district's standards for admitting students to Lowell High School, a college-preparatory public high school which accepted each year those applicants whose prior academic achievement placed them within approximately the top 15 percent of the junior-high graduates in the district. The school district, in order to maintain equal numbers of boys and girls in the school, applied higher admission requirements to girls than to boys.

In holding that this procedure denied the plaintiffs equal protection the Court said (pg. 1269):

> An unsupported notion that an equal number of male and female students is an essential element in a good high-school education was apparently the justification for the school

3. The problem of the differential admission standard apparently arose because the Boys Latin building had a seating capacity for approximately 3,000 students and the Girls Latin building had a seating capacity for approximately 1,500 students. Because of the disparity in the seating capacity of the two buildings, school officials, in evaluating the results of the examinations, first determined how many seats would be available in the Boys building. They then counted down from the top possible score of 200 until they had accepted a number of boys equal to the number of available seats, which thus established the cutoff of 120. A similar technique with reference to the number of seats available in Girls Latin resulted in the cutoff of 133.

4. The remedy devised by the Court, that is, to admit girls with a score of 127 or better, does not solve the problem of discrimination against girls who scored from 120 to 127, because, although it is true they would not have been admitted if a merged cutoff had been used in September 1970, a merged cutoff was not used, and therefore boys who scored from 120 to 127 at that time were admitted. The problem is, however, that taking care of these girls at the time of the decision would result in discrimination against other incoming ninth-grade students the following September, since there would then be fewer seats available for them.

district's policy requiring higher grade-point averages for females than for males. While that policy is not based upon an invidious stereotype such as was present in Reed and Frontiero, we do not read those cases so narrowly as to sanction all other sex discrimination. No actual proof that a balance of the sexes furthers the goal of better academic education was offered by the school district.[5]

As a matter related to sex discrimination in admissions, see Sex Restricted Scholarships and the Charitable Trust, 59 Iowa L.R. 1000 (1974), for a theoretical discussion of scholarships for men only as a form of sex discrimination. There are apparently no cases in this area yet,[6] although there are many cases in which attacks have been made on charitable trusts because of restrictions in them related to race and national origin.[7, 8]

5. The Court also said that had the advanced courses given at Lowell been offered in each high school, rather than in a separate high school, and had the school district applied the same, or similar admission standards, the admission standards would have been an illegal discrimination on the basis of sex under Title IX of the Education Amendments of 1972, 20 U.S.C.A. Section 1681. See Appendix S.

6. A 1973 Women's Rights Project Legal Docket of the American Civil Liberties Union indicated that a suit to be entitled Lach v. University of Minnesota, to enjoin higher Minnesota educational institutions from participating in the Rhodes Scholarship Program (since the Program will not consider women) was in preparation. No reference to this suit has been found in any legal reporting service.

7. As to another matter tangentially related to admissions, see Vlandis v. Kline, 412 U.S. 441, 93 S.Ct. 2230 (1973), where a female married student successfully challenged on due process grounds a Connecticut statute mandating an irrebuttable presumption of nonresidency for the purposes of qualifying for reduced tuition rates at a state university. Student's husband was lifelong resident of Connecticut and after their marriage, student transferred from a California to a Connecticut school. Connecticut classified her as an out-of-state student, notwithstanding couple had established a home in Connecticut and she had a Connecticut driver's license and had registered to vote there. (An unmarried female student under similar facts--except as to marriage--was also successful in this challenge.)

8. As to residency rules for tuition purposes, under which a married female student is presumed to have the domicile of her husband, see Samuels v. University of Rittsburgh, 375 F. Supp. 1119 (W.D. Penn. 1974). Though the presumption could be rebutted by convincing evidence, there was a denial of equal protection when married female students constituted the only group whose classification for such tuition purposes was tied to the classification of someone else.

APPENDIX L

SEX DISCRIMINATION IN EDUCATION--ATHLETICS

Cases alleging sex discrimination in athletics seem to fall into two categories--those in which girls desire to play in interscholastic athletic competition on boys' high-school teams, and those in which girls desire to play on boys' Little League baseball teams. The categories will be considered in order.

HIGH-SCHOOL INTERSCHOLASTIC COMPETITION

It appears that all the fifty states have some kind of an organization (whose members are high schools or school districts operating high schools) which establishes rules governing interscholastic athletic competition among the high schools in the particular state. Until the recent past, many, if not all, of these organizations had rules providing that females and males could not compete on the same team. This had two discriminatory effects: one, it kept girls out of interscholastic competition in many sports, and, two, it meant girls could not play certain sports even in their own high school.

In the early nineteen-seventies, individual girls, each of whom happened to be exceptional in her sport of interest, began to challenge, at about the same time, the sex-restrictive rules of these various interscholastic athletic associations, and in the decided cases, as will be seen below, the courts have distinguished between so-called contact and noncontact sports. The cases have generally been brought under 42 U.S.C.A. Section 1983[1] (hereafter referred to in this appendix as Section 1983).

In the first case, Reed v. Nebraska School Activities Association, 341 F. Supp. 258 (Neb. 1972), the plaintiff, a female high-school student, obtained a preliminary injunction enjoining the interschool activities association and various school officials from prohibiting her from participating on the boys' golf team. The activities association had a rule excluding girls from playing on a boys' athletic team, and her school had no girls' team.

The Court quickly disposed of the threshold questions. First, it found that the activities association was a "person" within the meaning of Section 1983 insofar as injunctive relief was concerned. Second, it found that the association was sufficiently entwined with the public schools of the state to cause its actions to be under "color of state law." The Court then reached the merits of the case, saying (pg. 262):

> One justification advanced by the defendants for the rule prohibiting girls from playing golf with and against boys is that golf, unlike education, is a privilege, rather than a right. Even assuming that interschool competition in golf is not educational, the privilege-right distinction is not viable. * * * The issue is not whether Debbie Reed has a "right" to play golf; the issue is whether she can be treated differently from boys in an activity provided by the state. Her right is not the right to play golf. Her right is the right to be treated the same as boys unless there is a rational basis for her being treated

1. See Appendix A-1.

differently. The burden on that issue rests upon the state--the defendants.

In the next case, Brenden v. Independent School District, 342 F. Supp. 1224 (Minn. 1972), aff'd. 477 F.2d 1292 (8th Cir. 1973), one of the female plaintiffs was an outstanding high-school tennis player, the other excelled in cross-country and in cross-country skiing. They, too, challenged a similar exclusionary rule promulgated by the Minnesota State High School League. As in Reed, the Court quickly found that the State High School League and the school districts were persons within the meaning of Section 1983 and that they were acting under color of state law.

The court, though finding for the plaintiffs, emphasized that it was making a very narrow ruling. First, it was not deciding whether participation in interscholastic athletics was of such importance as to be fundamental in nature; second, it was not deciding whether sex, as a classification, was suspect in the historical sense; third, it was dealing only with the rights of two exceptionally qualified female high-school students in three sports.

At the trial there was a great deal of expert testimony concerning physiological differences between males and females with respect to height, muscle mass, size of heart, breathing capacity, and running ability as related to the construction of the pelvic area. The trial court, saying that such physiological differences might, on the average, prevent the great majority of women from competing on an equal level with the great majority of males, and that the differences might form a basis for defining class competition on the basis of sex (for the purpose of encouraging girls to compete in their own class and not in a class consisting of boys involved in interscholastic athletic competition), concluded that these differences had little relevance to the situation of the plaintiffs in this particular case. The trial court also rejected an argument by the defendants that to grant the two plaintiffs the relief requested would hamper the development of other girls' athletic programs in the future.

In affirming the trial court's decision in Brenden, the Eighth Circuit said (pg. 1295):

> Having stated what this case is about, we would also like to emphasize what it is not about. First, because neither high school provided teams for females in the sports in which Brenden and St. Pierre desired to participate, we are not faced with the question of whether the schools can fulfill their responsibilities under the Equal Protection Clause by providing separate but equal facilities for females in interscholastic athletics. * * * Second, because the sports in question are clearly noncontact sports, we need not determine if the High School League would be justified in precluding females from competing with males in contact sports such as football.[2]

Later in the same year that Reed and Brenden arose, a different result was reached in Bucha v. Illinois High School Association, 351 F. Supp. 69 (N.D. Ill. 1972). The case was a class action by female high-school students challenging high-school association bylaws placing limitations on girls' swimming competiton which were not applicable to swimming competition among boys. (By the time the case came to trial, the association had amended its bylaws to allow interscholastic swimming meets for girls, but with respect to such meets, there was a prohibition on organized cheering, a one-dollar limitation on the value of awards, and a prohibition on overnight trips.)

The Court, in finding against the plaintiffs, emphasized that the case did not deal with the total

2. Although Title IX of the education amendments of 1972 was not involved in the case, the Court said (pg. 1298), "Discrimination in high school interscholastic athletics constitutes discrimination in education."

absence of a girls' athletic program. It then went on to say (pgs. 74-5):

> Since the instant inquiry probes only the rationality of separate programs for the sexes, this court takes judicial notice of the fact that at the pinnacle of all sporting contests, the Olympic games, the men's times in each event are consistently better than the women's. * * * Moreover, plaintiffs' claim that the physical and psychological differences between male and female athletes are "unfounded assumptions" is refuted by expert testimony presented and received in a case which plaintiffs themselves cite in their favor.[3] All of these facts lend substantial credence to the views expressed by women coaches and athletes in defendants' affidavits that unrestricted athletic competition between the sexes would consistently lead to male domination of interscholastic sports and actually result in a decrease in female participation in such events. This court finds that such opinions have a rational basis in fact and are a constitutionally sufficient reason for prohibiting athletic interscholastic competition between boys and girls in Illinois.[4]

In Morris v. Michigan State Board of Education, 472 F.2d 1207 (6th Cir. 1973), the plaintiffs, high-school girls, had been prevented from competing in interscholastic tennis matches by a rule of the Michigan High School Athletic Association which excluded girls from interscholastic athletic contests when part or all of the membership of one or both of the competing teams was composed of boys. A lower court entered a preliminary injunction invalidating the rule and enjoining the association from preventing the plaintiffs or any other girls in Michigan from participating fully in varsity interscholastic athletics because of their sex. The Sixth Circuit remanded with instructions to modify the injunction so as to make it apply only to noncontact sports.[5]

In Ritacco v. Norwin School District, 361 F. Supp. 930 (W.D. Penn. 1973), the plaintiff failed in an attempt to challenge by a class action an interscholastic athletic association rule which required separate girls' and boys' teams for interscholastic noncontact sports, as she had graduated from high school a few months earlier and therefore was no longer a member of the class she sought to represent. But even if this decision were wrong, the Court added, there would still be no denial of any constitutional right, because the association had implemented a rule which required the maintenance of separate noncontact sport teams for males and females, and the plaintiff herself had been able to participate in girls' tennis, gymnastics, and swimming at her high school. The Court briefly considered the "separate but equal" problem in these words (pg. 932):

> Superficially, the maintenance of separate sports teams suggests the possibility of a denial of equal protection of the laws, but sound reason dictates that "separate but equal" in the realm of sports competition, unlike that of racial discrimination, is justifiable and should be allowed to stand where there is a rational basis for the rule. * * * Sex, unlike race, is not an inherently suspect classification. Indeed it seems clear that where the opportunities for engaging in sports activities are equal, as is true here, the rule requiring separate teams based on sex fosters greater participation in sports.

3. Brenden at the district court level, supra.

4. In Hollander v. Connecticut Interscholastic Athletic Conference, Civil No. 124427 (Conn. Super. Ct., New Haven County, 1971), appeal dismissed in 295 A.2d 671 (Conn. 1972), the trial court refused to enjoin the statewide athletic conference from barring high-school girls from competing in cross-country even though no separate program existed for women. The court theorized that men would avoid participation for lack of incentive if forced to compete against women. Another state court reached an opposite result, as to golf, and where the great majority of high schools in the state did not maintain interscholastic athletic programs for girls, in Haas v. South Bend Community School Corporation, 289 N.E.2d 495 (Ind. 1972).

5. The Court, however, did not pass on the precise question of whether a classification based on sex was permissible in contact sports. Instead, the remand seemed based on the ground the injunction was broader than the pleadings.

Gilpin v. Kansas State High School Activities Association, 377 F. Supp. 1233 (Ka. 1973), similar in character to the preceding cases, involved a challenge to a rule of the activities association which was claimed to have prevented the plaintiff from participating in cross-country competition solely on the basis of her sex. As in the previous case, the Court had no difficulty finding that the association was a person and was acting "under color of state law" within the meaning of Section 1983, but in holding for the plaintiff, it specifically limited the application to the particular factual situation before it and did not pass on the basic constitutionality or unconstitutionality of the association's rule as applied to girls in general.

In summarizing, it can be seen that the courts are mostly in accord as to the impropriety, in terms of Section 1983, of a high-school association rule limiting interscholastic noncontact athletic competition to boys only. The practical result has been that many of these associations throughout the country are now changing their rules to accomodate what the courts have said on the subject.[6] But there seems to be a reluctance on the part of the courts to extend the principle to contact sports, and even with respect to noncontact sports, there is as yet little judicial opinion on the question of whether "separate but equal" facilities would meet constitutional requirements.

THE "LITTLE LEAGUE" BASEBALL CASES

In Magill v. Avonworth Baseball Conference, 364 F. Supp. 1212 (W.D. Penn. 1973), a ten-year-old girl sought injunctive relief which would permit her to participate with boys of approximately that age in a summer baseball program run by the defendant, ABC, a non-profit corporation chartered by the state of Pennsylvania. When the plaintiff had first applied to join the program, the ABC directors had unanimously voted to continue to limit the program to participation by boys only.

The action was brought under Section 1983,[7] and the case was decided on the ground that there was not the requisite degree of "state action" to invoke Section 1983. It was not enough, for example, the Court said, that the State had granted a charter to ABC, or that the municipality permitted the ABC to use a community baseball field free of charge, or that the local school board permitted the ABC to use two other baseball fields.

The Court went on to say, however, that even if sufficient state action existed to invoke Section 1983, it would still decline to issue an injunction, because the classification system used by the defendant was rational (pgs. 1216-7):

> The directors of the baseball conference assign two reasons for their action. First, that they believe that young girls would be endangered physically if allowed to compete with boys in organized baseball and second, that to permit the girls to compete would destroy the program already underway because the boys would drop out.

6. A recent newspaper article indicates that a Pennsylvania lower court, at the request of the Pennsylvania Attorney General, has invalidated one-sex rules, as they apply to noncontact sports, of the State's activities association.

7. 42 U.S.C.A. Section 1985--presumably Section 1985(3)--was also involved, but the Court said this section protected only against discrimination which occurred under "color of state law." For case law to the contrary, see Appendix A-1.

> The directors, male and female, were unanimous in their opinions that baseball is a contact sport at times and at times the contact is violent. We can take judicial notice of the fact and find that baseball is a contact sport. * * *
>
> * * *
>
> Accordingly, we hold that sex is a rational distinction where a contact sport is involved.

Magill was vacated and remanded in an unpublished opinion in 497 F.2d 921 (3rd Cir. 1974).

King v. Little League Baseball, Inc., 505 F.2d 264 (6th Cir. 1974), adds nothing of substance to the general law in this area. The plaintiff was a twelve-year-old girl wanting to play baseball with a local Little League in Michigan. The local Little League was chartered by the defendant, Little League Baseball, Inc., which in turn was a federally chartered corporation.

It appeared that when the local Little League made a decision to let the plaintiff play on its team, the national Little League threatened to and then finally did revoke the local's charter. But by the time the Section 1983 proceeding had been begun, a municipality had cut off the use of its facilities to the defendant and the plaintiff was playing with the local Little League on municipally owned playing fields. Under these circumstances, the Court said, there was no state action as far as the national Little League organization was concerned.

In Fortin v. Darlington Little League, Inc., 376 F. Supp. 473 (R.I. 1974), now on appeal, the Court found there was sufficient state action for the purposes of Section 1983 when, among other things, the baseball diamonds utilized by the defendant Little League were owned by the city and were available for public recreation, when adherence by the city to the League's specifications for such fields was primarily for the benefit of the League and only incidentally for other groups of youths and the general public, and when the general public was often precluded from utilizing the city's facilities as a result of the heavy schedule engaged in by the League.

However, the Court took judicial notice that baseball was a contact sport and that at times such contacts were violent. The goal of safety, it continued, was a legitimate concern of the defendant, and for that reason the defendant's rule excluding girls between the ages of eight to twelve years from participating in its baseball games could not be said not to be rationally related to the effectuation of that reasonable goal.[8]

SUMMARY

The courts seem inclined to sustain challenges to state athletic association rules (when the association's members include tax-supported public high schools) which deny girls the right to participate on boys' teams when there is no girls' team insofar as noncontact sports are concerned. These rules, or their implementation, constitute "state action" sufficient to invoke Section 1983 and the equal protection clause.

It also seems the courts are generally inclined not to sustain such challenges when contact sports are involved, but even in this area there has been little discussion of what girls must be provided in the

8. In National Organization for Women v. Little League Baseball, Inc., 318 A.2d 33 (N.J. Super. Ct. 1974), it was said that expert testimony on anatomy, physiology, reaction time, and maturation permitted a state civil-rights enforcement agency to have found as a fact that girls of ages eight to twelve were not as a class subject to materially greater hazards of injury while playing baseball than boys of the same age group.

way of substitute facilities when they are excluded from participating in contact sports. There has also been little discussion of whether "separate but equal" facilities satisfy constitutional requirements.

In the Little League cases, there is disagreement not so much as to whether baseball is a contact sport, but as to whether playing it presents more of a hazard to girls in the approximately eight-to-twelve age bracket than it does to boys in the same bracket.[9]

Constitutional challenges aside, Title IX of the Education Amendments of 1972 will open for judicial review numerous aspects of possible discrimination by sex in the athletic programs operated by educational institutions.

9. By P.L. 93-551, Dec. 26, 1974, Congress amended the national Little League's federal charter to open the League to girls as well as boys.

APPENDIX M

SEX DISCRIMINATION IN EDUCATION--RULES AFFECTING STUDENTS

RULES ABOUT PREGNANCY OR MARITAL STATUS

In Perry v. Grenada Municipal Separate School District, 300 F. Supp. 748 (N.D. Miss. 1969), the two plaintiffs, unwed mothers of school age, brought an action under 42 U.S.C.A. Section 1983 (hereafter referred to in this appendix as Section 1983)[1] challenging a policy of the school board which denied admission to unwed mothers. The plaintiffs introduced evidence tending to show that unwed mothers who were allowed to continue their education were less likely to have a second illegitimate child. The defendants argued that the presence of unwed mothers in the schools would be a bad influence on the other students vis-a-vis their presence indicating society's approval or acquiescence in the illegitimate births, or vis-a-vis the association of the unwed mother with the other students.

But a rule which forever bars an individual from obtaining an education, the Court said, was too rigid. It held, therefore, that the continued exclusion of the plaintiffs without a hearing or some other opportunity to demonstrate their qualifications for readmission was unreasonable and arbitrary. At the same time, it emphasized that lack of moral character would certainly be a reason for excluding a child from public education, and if the board were convinced a girl's presence would taint the education of other students, exclusion would be justified. But the inquiry should be thorough, it continued, and weighed in keeping with the serious consequences of preventing an individual from attaining a high-school education.

A few years later, the judge who wrote the opinion in Perry reaffirmed it in Shull v. Columbus Municipal Separate School District, 338 F. Supp. 1376 (N.D. Miss. 1972), where a school district excluded the plaintiff from the tenth grade solely because she was an unwed mother.[2]

In Ordway v. Hargraves, 323 F. Supp. 1155 (Mass. 1971), the plaintiff, a pregnant unmarried high-school senior, brought an action under Section 1983 against school officials who had informed her she was to stop attending regular classes, but who had also said she could make use of such school facilities as the library and teaching resources on any school day after the normal dismissal time of 2:16 p.m. School officials had further said she could participate in senior activities, such as class trips, obtain tutoring at no cost if necessary, and take examinations periodically.

At the hearing for a preliminary injunction, the plaintiff's physician testified she was in excellent health to attend school, and he expressed the opinion the dangers in attending school were no worse for her than for a

1. See Appendix A-1.

2. But in Houston v. Prosser, 361 F. Supp. 295 (N.D. Ga. 1973), where an unmarried, fifteen-year-old mother was denied readmission to high school as a regular daytime student, though she was permitted to attend night school, it was said that because high-school students who became parents were normally more precocious than other students, the policy of daytime exclusion was rationally related to the legitimate state purpose of maintaining discipline. It was a denial of equal protection, however, to impose on her the customary night-school requirement that such students pay tuition and provide their own textbooks.

nonpregnant girl student. Another doctor testified the exclusion of the plaintiff would cause her mental anguish which would affect the course of her pregnancy. A psychiatrist expressed the opinion that young girls in the plaintiff's position who were required to absent themselves from school would become depressed, and that this depression of the mother would have an adverse effect on the child. The psychiatrist also said that from a psychiatric point of view, it was desirable to keep a person in the position of the plaintiff in contact with her friends and peer group, and that she should not be treated as having a disease. A social worker testified that social workers who specialized in working with pregnant unwed girls felt it desirable to give the girl a choice of whether to remain in class or have private instruction after regular class hours. Finally, the chairman of the Guidance Program of the Harvard Graduate School of Education testified that in his opinion the type of program the school officials had established for after-hours instruction was not educationally the equivalent of regular class attendance.

Based on these facts, the Court granted the injunction, saying (pg. 1158):

> It would seem beyond argument that the right to receive a public school education is a basic personal right or liberty. Consequently, the burden of justifying any school rule or regulation limiting or terminating that right is on the school authorities. * * * On the record before me, respondents have failed to carry this burden.[3]

MISCELLANEOUS

Mollere V. Southeastern Louisiana College, 304 F. Supp. 826 (E.D. La. 1969), involved the question of whether a coeducational state college's requirement that all unmarried women students under 21 not living with their parents or a close relative live in on-campus residence halls was offensive to the equal protection clause. Another rule required male freshmen to live on-campus, and it was undisputed that the college's sole reason for requiring women under 21 and male freshmen to live in college residence halls was to meet the financial obligations which had arisen out of the construction of the dormitories. The Court, in finding that the system of classification as to women under 21 (the rule as to male freshmen was not in issue) could not stand, said (pg. 827):

> For purposes of this case it might be conceded that a state university may require all or certain categories of students to live on-campus in order to promote the education of those students. * * * It might also be reasonable for a university to require on-campus living of students in order that the university may more closely supervise them and protect their welfare as parens patriae when they are away from home. The sole issue in this case, on the other hand, is whether the College may require a certain

3. In a case not directly involving sex discrimination, Romans v. Crenshaw, 354 F. Supp. 868 (S.D. Texas 1972), the exclusion of the sixteen-year-old plaintiff from participation in many extracurricular activities simply because she was a divorcee was held to be a denial of equal protection. And in Holt v. Shelton, 341 F. Supp. 821 (M.D. Tenn. 1972), the exclusion of a married female high-school senior from participation in extracurricular activities was held, absent a showing of a compelling state interest, to deny equal protection. For cases involving a married male student similarly excluded, see Davis v. Meek, 344 F. Supp. 298 (N.D. Ohio 1972) and Hollon v. Mathis Independent School District, 358 F. Supp. 1269 (S.D. Texas 1973).

> group of students to live on-campus, not for the welfare of the students themselves but simply to increase the revenue of the housing system. * * * Why should the particular students who are the plaintiffs in this case bear any more of the financial obligation of the College housing system than any of their fellow students? * * * The sole reason offered by the College is that the plaintiffs comprise the precise number of students required to fill existing vacancies. If students with black eyes had filled the bill * * * they would have done equally well * * *. This is the type of irrational discrimination impermissible under the Fourteenth Amendment.[4]

The female college student in Robinson v. Board of Regents of Eastern Kentucky University, 475 F.2d 707 (6th Cir. 1973), cert. den'd. 416 U.S. 982, 94 S.Ct. 2382 (1974), was challenging curfew regulations applicable only to female students. During their freshman year, female students were required to be in their dormitories by 10:30 p.m. Monday through Thursday. The curfew hour on Friday and Saturday nights was 1:00 a.m., and twelve midnight was the Sunday curfew.

Beginning with the second year, female students could have the privilege of unrestricted hours with no curfew if they maintained a certain academic average, paid a $15.00 fee per semester,[5] and if under 21, had their parents' written consent.

During the pendency of the lawsuit, the defendant made new regulations. First-semester women were required to be in their dormitory by midnight Sunday through Thursday and by 2:00 a.m. on Friday and Saturday nights. All other women students could have self-regulated hours by paying a $10 fee per semester and gaining the permission of their parents, if under 21.

The plaintiff commenced her action when she was a freshman, alleging that the defendant, by imposing dormitory hours for women, while granting self-regulated hours to male students, had violated her right to equal protection. The action was dismissed by the lower court at a time when she was a sophomore.

On appeal, she claimed that even though, under the presently applicable dormitory regulations, she could and did have self-regulated hours with her parents' permission, the fact she had to get such permission while male students did not, resulted in a continuing denial of her equal protection rights. The Court disposed of the case without deciding that issue, saying (pg. 711):

> (I)n this case we can find neither a fundamental right at issue nor a suspect classification being applied. The right which is the subject of regulation here is the right to have self-regulated hours without parental permission. This is not fundamental. We reaffirm that classification on the basis of sex is not a suspect classification. There-

4. In Poynter v. Drevdahl, 359 F. Supp. 1137 (W.D. Mich. 1972), the university had a rule requiring all single undergraduates not residing with their parents or legal guardians to live in on-campus residences. An exception was made, however, for members of three fraternities given such off-campus permission prior to the formulation of the rule. It was held the exception did not discriminate against females (within the meaning of the equal protection clause), absent a showing that similarly situated sororities had been denied permission to establish off-campus residences. And in an earlier case not directly involving sex discrimination, Pratz v. Louisiana Polytechnic Institute, 316 F. Supp. 872 (W.D. La. 1970), aff'd. 401 U.S. 1004, 91 S.Ct. 1252 (1971), it was held to be not unreasonable to have a rule requiring married students not living with a spouse to live on-campus even though married students living with a spouse could live off-campus. The rationale was based on the inadequacy of dormitories originally constructed for single-sex occupancy. In a more recent case, also not directly involving sex discrimination, it was said not to be improper under Section 1983 for a state university to exclude married students with children from quarters provided for married students without children. The classification was rational because it had as one basis a concern for the safety of such children. Bynes v. Toll, 512 F.2d 252 (2nd Cir. 1975).

5. The fee was to defray the cost of security guards.

> fore, we conclude that the rational relationship or traditional standard of equal protection review is applicable here.
>
> The State's basic justification for the classification system is that of safety. It asserts that women are more likely to be criminally attacked later at night and are physically less capable of defending themselves than men. It concludes that the safety of women will be protected by having them in their dormitories at certain hours of the night. The goal of safety is a legitimate concern * * * and this court cannot say that the regulations in question are not rationally related to the effectuation of this reasonable goal.
>
> The appellant claims that the safety justification is undermined by the shifting curfew for different nights of the week asserting that the streets are no safer at 12:30 a.m. on Saturday than they are at 12:30 a.m. on Wednesday. We hold, however, that the State could properly take into consideration the fact that on weekend nights many coeds have dates and ought to be permitted to stay out later than on weekday nights.

In Bond v. Virginia Polytechnic Institute, 381 F. Supp. 1023 (W.D. Va. 1974), an action by female graduate and undergraduate students challenging the constitutionality of the institute's student health plan, it was held that a policy of noninclusion of pap tests and gynecological examinations did not violate equal protection when the complaint did not allege there were any risks from which men were protected and women were not. (In dismissing the complaint, the Court relied on Geduldig v. Aiello, 417 U.S. 484, 94 S.Ct. 2485 (1974), where a state disability insurance program which excluded coverage for disabilities due to normal pregnancy was upheld on the ground the equal protection clause did not require a state to choose between attacking every aspect of a problem or not attacking any at all. Aiello is discussed in Appendices A and E.)

A residency rule for college tuition purposes, in which a married female student was presumed to have the domicile of her husband, was held to deny equal protection in Samuels v. University of Pittsburgh, 375 F. Supp. 1119 (W.D. Penn. 1974). Though the presumption could be rebutted by convincing evidence, married women constituted the only group whose classification for such tuition purposes was tied to the classification of someone else.[6]

6. In Wallace v. Ford, 346 F. Supp. 156 (E.D. Ark. 1972), a case not directly involving sex discrimination, secondary school dress regulations prohibiting skirts more than six inches above the knee and excessively tight skirts and pants were upheld, while those prohibiting "knicker suits," "jump suits," and skirts more than six inches below the knee were not. The student dress code, however, was applied uniformly to both sexes.

APPENDIX N

SEX DISCRIMINATION IN EDUCATION--TRACKING

Women concerned with education have objected to school policies which either exclude female students from certain courses (such as auto repairing or metal work) or require them to take certain courses (such as home economics) whether they want to or not.

It is known that numerous cases have been brought in this area, some of them by the American Civil Liberties Union, and it is also known that some of these have been settled, with the defendants agreeing to abandon the particular tracking involved. If any federal court cases have been decided in this area, however, they have not as yet been officially reported.

APPENDIX O

SEX DISCRIMINATION IN EDUCATION--TEXTBOOKS

Women concerned with education have objected over many years to stereotyped presentations of the female role in society, particularly in elementary-school reading texts. An extensive search of federal court decisions, however, reveals no reported cases in this area, undoubtedly due to First Amendment problems.

APPENDIX P

EXECUTIVE ORDER NO. 11246

Executive Order No. 11246, as amended by Executive Order No. 11375,[1] requires a government contractor or subcontractor or any contractor working on a federally assisted construction project not to discriminate on the basis of sex, to take affirmative action to remedy past discrimination, and to counteract discriminatory barriers to equal employment opportunity. Regulations apply the Executive Order to contractors and subcontractors holding contracts for more than $10,000, with sometimes more stringent requirements imposed on contractors holding contracts for $50,000 or more and involving 50 or more employees.

The reach of the Order is to all employees of the contractor, not merely those doing the contract work or in the facilities where the work is done, and review to determine whether a contractor is in compliance with the Executive Order may be initiated by the concerned federal agency or by the employee affected. In appropriate circumstances, contracts may be delayed, suspended, or terminated for noncompliance, and contractors may be denied eligibility for future contracts.

In 1969, the Women's Equity Action League initiated the strategy of filing formal complaints with the Department of Health, Education and Welfare in cases where it felt that educational institutions holding federal contracts were in violation of the Executive Order. In November, 1974, the Women's Equity Action League, joined by the National Organization for Women and other women's groups, sued HEW and the Department of Labor, alleging, among other things, a governmental pattern of nonenforcement of the requirements of the Executive Order as they applied to educational institutions.

The use of Executive Orders to prohibit employment discrimination by government contractors began with Executive Order No. 8802,[2] issued by President Roosevelt in response to complaints by black labor leaders about discrimination by defense contractors. The Order established a committee to investigate complaints of employment discrimination, but it could not administer sanctions and was considered ineffective. In 1954, an Executive Order extended the negative obligation not to discriminate to upgrading, demotion, transfer, recruitment, layoff, rates of pay, and selection for special training.[3] In 1961, a new concept--the one we have today--was introduced. The contractor, in addition to agreeing not to discriminate, had to agree to take affirmative action to ensure that applicants were employed and employees treated during employment without discrimination.[4] In 1967, Executive Order No. 11375[5] amended Executive Order No. 11246 to include sex as a prohibited discrimination.

During all the years, however, in which the concepts now present in Executive Order No. 11246 were

1. 3 CFR 169; 42 U.S.C.A. Section 2000e.
2. 6 Fed. Reg. 3109 (1941)
3. Executive Order No. 10557, 19 Fed. Reg. 5655 (1954).
4. Executive Order No. 10925, 26 Fed. Reg. 1977 (1961).
5. 32 Fed. Reg. 14303 (1967).

evolving, there was never any direct court challenge to the fundamental legality of the Orders themselves. But in a concurring opinion in Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 72 S.Ct. 863 (1952), Justice Jackson discussed the associated limitations of executive power. Jackson analyzed presidential action substantially as follows:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, he may be said to personify the federal sovereignty. * * * If his act is held unconstitutional under these circumstances, it usually means the Federal Government as an undivided whole lacks power.

2. When the President acts in absence of either a congressional grant or denial of authority, he can rely only upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

In Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (3rd Cir. 1971), cert. den'd. 404 U.S. 854, 92 S.Ct. 98 (1971), the legality of the so-called Philadelphia plan, established under the authority of Executive Order No. 11246 and requiring contractors in a five-county area to submit, as a precondition of federal assistance, an affirmative action program containing goals for minority hiring, was at issue. The Court, after citing Jackson's three categories of presidential power, said the President's authority to impose nondiscrimination provisions in federal contracts fell within the first category because it was action pursuant to the express or implied authorization of Congress. In all its procurement activities, the Court reasoned, the government had an interest in seeing that suppliers were not increasing costs and delaying programs by excluding from the labor pool available minority workmen.

When Congress authorized an appropriation for a program of federal assistance, the Court continued, and authorized the executive branch to implement the program by assistance to specific projects, it must be deemed--in the absence of statutory regulations to the contrary--to have granted the President a general power to act for the protection of federal interests. In the case of Executive Order No. 11246, it said, three presidents had "acted by analogizing federally assisted construction to direct federal procurement," and if such action had not been authorized by Congress (Jackson's first category), at the very least it fell within Jackson's second category, so that if no congressional enactments prohibited the presidential action, such action would be valid.[6]

6. In Savannah Printing Specialties and Paper Products Local Union 604 v. Union Camp Corp., 350 F. Supp. 632 (Ga. 1972), it was said that Executive Order No. 11246 is based on the inherent or implied power of the executive branch to determine the terms and conditions under which the United States will contract, that it is a valid exercise of the presidential authority, and that it possesses the force of statutory law.

In Contractors Association, the Court also rejected the argument that Congress, by dealing comprehensively with employment discrimination in Title VII, had occupied the field.[7]

The contractors also argued that even if Title VII did not prohibit presidential action in the area of fair employment on federal or federally assisted contracts, Section 703(j)[8] provided that Title VII should not be interpreted to require any employer or labor organization to grant preferential treatment to any individual or group because of the race of such individual or group on account of an imbalance which might exist with respect to the percentage of persons of any race employed in comparison with the percentage of persons of such race in the available work force in the community. As to this argument, the Court said that while Title VII possibly could not compel an employer to embrace a program such as the Philadelphia Plan, the issue was extraneous in the present case, because the challenged contract provision was imposed by the Executive Order, not Section 703(j) of Title VII. Title VII, in short, was a limitation only upon Title VII, not upon other federal remedies.

Next, the contractors argued that the plan violated Title VII because it interfered with a bona fide seniority system, contrary to Section 703(h),[9] which provides that it shall not be an unlawful employment practice for an employer to have different terms or conditions of employment pursuant to a bona fide seniority system. The unions, the contractors said, referred men from the hiring halls on the basis of seniority, and the Philadelphia Plan interfered with this arrangement since few minority tradesmen had high seniority. But the Court said, as it had with Section 703(j), that Section 703(h) was a limitation only upon Title VII, not upon other remedies.

And finally with respect to Title VII, the contractors argued that since the Philadelphia Plan required them to agree to specific goals for minority employment and required a good faith effort to achieve those goals, they would have to refuse to hire some white tradesmen and to classify employees by race, all in violation of Section 703(a),[10] which provides that it shall be an unlawful employment practice to fail to hire any individual because of such individual's race or to classify employees in any way which would deprive any individual of employment opportunities because of such individual's race.

To read Section 703(a) in this manner, the Court replied, would be to attribute to Congress the intention to freeze the status quo and to foreclose remedial action under other existing means for correcting existing evils.

The courts are less at ease when dealing not with "goals," as in Contractors Association, supra, but with "quotas." Thus, in Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), cert. den'd. 406 U.S. 950,

7. In addition, the Third Circuit had previously held that the remedies established by Title VII were not exclusive. Young v. International Telephone and Telegraph Co., 438 F.2d 757 (1971).

8. 42 U.S.C.A. Section 2000e-2(j). See Appendix B.

9. 42 U.S.C.A. Section 2000e-2(h). See Appendix B.

10. 42 U.S.C.A. Section 2000e-2(a). See Appendix B.

92 S.Ct. 2045 (1972),[11] the Eighth Circuit accepted the trial court's finding of discrimination in the hiring of firemen but could not accept the trial court's remedy--to fill the next twenty vacancies with minority persons. Focusing on that remedy, the Eighth Circuit said (pgs. 330-1):

> The absolute preference ordered by the trial court would operate as a present infringement on those non-minority group persons who are equally or superiorly qualified for the fire fighter's positions; and we hesitate to advocate implementation of one constitutional guarantee by the outright denial of another. Yet we acknowledge the legitimacy of erasing the effects of past racially discriminatory practices. * * * (T)o accommodate these conflicting considerations, we think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area. Such a procedure does not constitute a "quota" system because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis, and it could well be that many more minority persons or less, as compared to the population at large, over a long period of time would apply and qualify for the positions. (Emphasis supplied.)

Reasoning in this fashion, the Court said it would be in order for the trial court to mandate that one out of every three persons hired by the Fire Department would be a qualified minority individual until at least twenty minority persons had been so hired.[12]

In a similar vein, it was said in United States v. Wood Wire and Metal Lathers International Union, Local No. 46, 471 F.2d 408 (1973), cert. den'd. 412 U.S. 939, 93 S.Ct. 2773 (1973), that while quotas merely to attain racial balance in employment are forbidden by Title VII, quotas to correct past discriminatory practices are not.

One problem inherent in Executive Order No. 11246 is that once an employee or applicant for employment has filed a complaint with the appropriate federal agency, he or she has no control over the proceedings.

In Farkas v. Texas Instrument, Inc., 375 F.2d 629 (5th Cir. 1967), cert. den'd. 389 U.S. 977, 88 S.Ct. 480 (1967), a former employee of a government contractor tried to invoke a third-party beneficiary concept to sue the contractor for a violation of his rights under Executive Order No. 11246. The Court cited with approval the decision in Farmer v. Philadelphia Electric Co., 329 F.2d 3 (3rd Cir. 1964), where it was said that the history of the Executive Order, the rules and regulations made pursuant to it, and the actual practice in the enforcement of the nondiscrimination provisions were all strong persuasive evidence that the threat of a private civil action was not contemplated.[13]

11. The case involved 42 U.S.C.A. Section 1981 (see Appendix B), not Executive Order No. 11246.

12. In suggesting this approach, the Eighth Circuit relied on Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S.Ct. 1267 (1971), where it was said the use of mathematical ratios as "a starting point in the process of shaping a remedy" was not unconstitutional and was "within the equitable remedial discretion of the District Court."

13. In neither Farkas nor Farmer had the plaintiff exhausted his administrative remedies. In Chambers v. United States, 451 F.2d 1045 (Ct. of Cl. 1971), it was held that, under an Executive Order directing equal employment opportunity for all civilian employees and applicants for federal employment, the plaintiff who, but for discrimination because of race, would have been employed on a certain date, was entitled to recover back pay from that date until the date she was actually employed, less any amount she might have earned in the interim.

In Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Penn. 1972), rev. on other grounds, 477 F.2d 1 (3rd Cir. 1973), a female assistant professor, alleging that the university discriminated against women in all areas of employment, brought one of her causes of action under Executive Order No. 11246. It was held the Executive Order created no right in an individual to seek injunctive relief or to assert a claim for damages against an alleged noncomplying contractor. To the same effect is Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Penn. 1974).

In Thorn v. Richardson, ___ F. Supp. ___, 4 FEP Cases 299 (W.D. Wash. 1971), a case in which women welfare recipients seeking entrance into a job-training program authorized by the Social Security Act alleged they were discriminated against by regulations giving entry priority for welfare recipients to unemployed fathers, it was said the plaintiffs were entitled to a judgment in the nature of mandamus requiring the federal agencies involved to comply with and enforce the provisions of Executive Order No. 11246. In Freeman v. Shultz, 468 F.2d 120 (D.C. Cir. 1972), a class action to enjoin government officials from awarding further contracts until the employment practices of a certain contractor complied with Executive Order No. 11246 was dismissed because the plaintiffs had not availed themselves of their administrative remedies by filing complaints with the particular government agencies involved. The Court indicated, however, that if the plaintiffs did not obtain relief through the administrative agencies, they could then seek the aid of the judiciary. And in Legal Aid Society of Alamosa County v. Brennan, 381 F. Supp. 125 (N.D. Cal. 1974), it was also stated that mandamus lies against federal officials charged with the duty of overseeing affirmative action programs required by Executive Order No. 11246 to compel them to disapprove such programs not meeting the requirements of the Order. Finally, in Lewis v. Western Airlines, Inc., 379 F. Supp. 684 (N.D. Cal. 1974), it was said that when an employee alleges he or she has exhausted all available administrative remedies under Executive Order No. 11246, he or she then has standing to maintain a private cause of action under the Executive Order against the employer, and that mandamus was also available to compel federal officials to comply with their duties under the Order.[14]

SUMMARY

The courts agree that Executive Order No. 11246 is a proper exercise of presidential power, that it has the force and effect of statutory law, that it has not been preempted by Title VII, and that it does not conflict with Title VII.

With respect to affirmative action programs, whether required by Executive Order No. 11246, mandated by the courts, or entered into as part of a consent decree, the courts seem to agree that the use of "goals," in which an employer has to use its "best efforts" to achieve the goals, does not create an unlawful

14. In Taliaferro v. Dykstra, ___ F. Supp. ___, 10 FEP Cases 441 (E.D. Va. 1975), it was said that a discharged college teacher was entitled to file a charge of alleged sex discrimination against the college with HEW seeking personal redress under the Executive Order, contrary to the college's claim that the Executive Order provided no remedy for an individual.

preference. There is a gray area, however, when such affirmative action programs impose quotas. Some courts have imposed something in the nature of a quota for "one time only" to correct the effects of past discrimination. In such efforts, the use of mathematical ratios as a first step is permitted, but the direct imposition of permanent quotas is not. The gray areas between these two poles will have to be defined, probably on a case by case basis, in future litigation.

A number of courts have said that an aggrieved employee or applicant for employment has no right to sue a government contractor directly under Executive Order No. 11246, either as a third-party beneficiary or otherwise, particularly if administrative remedies have not been exhausted, but there is authority to the effect that an aggrieved individual can bring an action for mandamus against government officials charged with administering the provisions of the Executive Order. There is also recent authority to the effect that if an aggrieved individual has exhausted his or her administrative remedies, he or she may even sue the government contractor directly.

In essence, however, the primary sanction is the threat of termination or suspension of the government contract.[15]

15. The Department of Health, Education and Welfare, delegated enforcement responsibilities for educational institutions, has never debarred any such institutions from holding federal contracts, although it has delayed the awarding of contracts in some cases.

APPENDIX Q

THE EQUAL PAY ACT

The Equal Pay Act of 1963 (hereafter referred to in this appendix as the EPA), which added subsection (d) to Section 6 of the Fair Labor Standards Act of 1938, as amended,[1] provides in part as follows:

> (1)No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i)a seniority system; (ii)a merit system; (iii)a system which measures earnings by quantity or quality of production; or (iv)a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of an employee.

Section 6 covers (with exceptions not material here) every employee who "is engaged in commerce or in the production of goods for commerce or is employed in an enterprise engaged in commerce or in the production of goods for commerce,"[2] but Section 13(a)(1) of the Fair Labor Standards Act (hereafter referred to in this appendix as the FLSA)[3] exempted any employee employed "in a bona fide executive, administrative, or professional capacity." The Education Amendments of 1972 removed this exemption, and such previously exempted employees are now covered by the EPA.

The EPA, it has been said,[4] was intended as a broad charter of women's rights in the economic field, which sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences that flow from it.

Under the EPA, an aggrieved employee can file suit against an employer and ask for, among other things, back pay and an additional equal amount as liquidated damages, and is entitled to reasonable attorney's fees if successful. The Secretary of Labor can also bring an action to recover back wages or he can ask for an injunction, but once the Secretary sues, the employee's right to do so is terminated.

An EPA plaintiff, the Supreme Court has recently said,[5] has the burden of proving the employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires

1. The Equal Pay Act is found in 29 U.S.C.A. Section 206(d).
2. 29 U.S.C.A. Section 206(a).
3. 29 U.S.C.A. Section 213(a)(1).
4. Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. den'd. 398 U.S. 905, 90 S.Ct. 1696 (1970).
5. Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223 (1974).

equal skill, effort, and responsibility, and which are performed under similar working conditions."

It also said, with respect to the EPA's four exceptions--a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex--that once a plaintiff has carried the burden of showing the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show the differential is justified under one of these four exceptions. This view, it added, was consistent with the general rule that the application of an exemption under the FLSA was a matter of affirmative defense on which the employer had the burden of proof.

It is now appropriate to consider some of the judicial decisions interpreting the main elements of Section 206(d).

EQUAL WORK

For the first few years of the EPA, there was uncertainty as to whether its legislative history required the term "equal work" to be treated as the equivalent of "identical work." Then, in the landmark case of Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. den'd. 398 U.S. 905, 90 S.Ct. 1696 (1970), it was held that the compared jobs need not be identical but only "substantially equal."

In Wheaton, male selector-packers in a bottle factory received approximately ten percent more per hour than female selector-packers. Selector-packers worked at long tables and visually inspected bottles for defects as they emerged on a conveyor. In the department there was another category of employees known as snap-up boys, who crated and moved bottles and functioned as handymen. They were paid a few cents per hour more than female selector-packers, and there were occasions when male selector-packers spent a limited portion of their time doing the work of snap-up boys. For this reason, the defendant argued that male and female selector-packers were not performing "equal work." It also argued that the flexibility of the males, i.e., the fact they could be available to perform the work of snap-up boys, was a "factor other than sex," thus justifying a wage differential. This argument, too, was quickly rejected, the Court saying that one of the serious imperfections in the claim of flexibility was the absence "of any finding or explanation why availability of men to perform work which pays two cents per hour more than women receive should result in overall payment to men of 21½ cents more than women for their common work."

The degree of "equality" necessary is difficult to define. In Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), for example, it was said (pg. 238-9):

> While the standard of equality is clearly higher than mere comparability yet lower than absolute identity, there remains an area of equality under the Act the metes and bounds of which are still indefinite. * * * Like many other legal concepts, that of equality under the Equal Pay Act is susceptible of definition only by contextual study.

As one example of this "contextual" study, in Brennan v. People's Elec. Co-op., Inc., 385 F. Supp. 581 (E.D. Okl. 1974), there was no EPA violation when the employer paid a male payroll and materials clerk $3.55 per hour while paying two cashier-receptionists, a billing clerk, and a capital credit clerk, all females, only $3.20 per hour, where the male employee's job of making company payrolls, keeping an inventory

of company materials, ascertaining average prices on all inventory items, and preparing reports for the general manager all required more skill, effort and responsibility than the jobs of the female employees in collecting utility payments, sending out utility bills, and computing capital credits.

In Wirtz v. Rainbo Baking Co., 303 F. Supp. 1049 (E.D. Ky. 1967), it was said that while small differences in job requirements can easily be made, they make no real difference where the work is substantially the same. On the other hand, the EPA does not authorize courts to equalize wages[6] merely because they find that two substantially different jobs are worth the same monetarily to the employer. Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972). At the same time, the courts are not to defer to overly nice distinctions in job content and therefore permit employers to evade the EPA at will. Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974).

Furthermore, jobs can have different titles and still be substantially equal. Hodgson v. Food Fair Stores, Inc., 329 F. Supp. 102 (M.D. Penn. 1971).

Company job descriptions are not controlling on the question, and testimony by employees as to their actual duties is customarily entitled to more weight. Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970). The controlling factor, in short, is job content. Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973), cert. den'd. 414 U.S. 822, 94 S.Ct. 121 (1973).

In Food Fair Stores, Inc., supra, it was said that where primary duties were essentially the same, differences in subsidiary tasks did not render them unequal, absent a showing the subsidiary tasks required significantly greater skill, effort, and responsibility than was required for the common primary functions.

A job performed by women on a day shift which is substantially equal to a job performed by men on the night shift must have the same base pay (though a "shift" differential is allowable) and a company cannot cure a violation of the EPA by opening the night shift to women while continuing to pay women performing the same job on the day shift a lower rate. Shultz v. American Can Co.-Dixie Products, 424 F.2d 356 (8th Cir. 1970).

It is not necessary that the two sexes be employed simultaneously for there to be a violation. For example, in Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973), cert. den'd. 414 U.S. 822, 94 S.Ct. 121 (1973), a female replacing a male as a supervisor of a data processing department was paid approximately 50 cents an hour less, and discrimination was found.

But in Krumbeck v. John Oster Mfg. Co., 313 F. Supp. 257 (E.D. Wis. 1970), a woman claimant employed as an armature balancer failed to prove she was discriminated against in violation of the EPA, where during the period involved no male had ever worked at that job or any other job with substantially similar duties.

In Brennan v. Woodbridge School District, ___ F. Supp. ___, 21 WH Cases 966 (Del. 1974), it appeared the school district employed a female as a teacher and girls' softball coach, and a male as a teacher and boys' baseball coach. Both had no particular experience in coaching, but the male was paid one-third more.

6. 29 CFR Section 800.110 interprets "wages" to mean "all payments made to or on behalf of the employee as remuneration for employment." This concept includes most fringe benefits.

The Court, noting that the duties of both coaches consisted of recruiting and supervising teams, accounting for equipment and uniforms, and arranging schedules of practice and outside games, said (pg. 967):

> There may exist incidental differences in the jobs performed by the male and female but such differences are inconsequential and are not performed during any substantial period of time, nor do they require greater expenditure of skill, effort and/or responsibility.[7]

The language in the EPA to the effect that "equal work" must require "equal skill, effort, and responsibility" has been held to require three separate tests. Brennan v. J. M. Fields, Inc., 488 F.2d 443 (5th Cir. 1973), cert. den'd. ___ U.S. ___, ___ S.Ct. ___, 43 U.S.L.W. 3213 (1974).

EQUAL SKILL

The administrative interpretation of "equal skill" provides that skill includes such factors as experience, training, education, and ability, and must be measured in terms of the performance requirements of the job; furthermore, possession of a skill not needed to meet requirements of the job cannot be considered in making a determination regarding equality of skill, and the efficiency of an employee's performance in the job is not in itself an appropriate factor to consider in evaluating skill.[8]

In Shultz v. Kimberly-Clark Corp., 315 F. Supp. 1323 (Tenn. 1970), it was said various assembly-line jobs in a paper factory were equal in "skill" because the work was capable of being learned by observation and practice without previous specialized education or experience, even though some persons might be able to handle certain jobs more easily because of individual aptitude.

In Brennan v. Houston Endowment, Inc., ___ F. Supp. ___, 21 WH Cases 561 (S.D. Tex. 1974), the Court found that the skill required by male custodians for the operation of floor buffers and similar devices and the skill required by female custodians for cleaning venetian blinds with tools were "equal." Thus, even if the duties are different, there can still be equal skill if the two jobs are fundamentally similar.

In Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), it was recognized that work performed by male orderlies but not by female aides, such as catheterization, setting up traction, helping in the application of heavy casts, and subduing violent patients required special skills. But this did not justify paying orderlies more than aides when only an insignificant portion of the orderlies' time was spent on these duties and the aides performed other duties requiring as much skill.

An opposite result was reached in Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256 (5th Cir. 1972), where it was said that insertion of a catheter by a male orderly was a skilled nursing

7. The Court also cited with approval 29 CFR 541.3, General Regulations, which states in part that the term "employee employed in a bona fide professional capacity" in Section 13(a)(1) of the FLSA includes an employee whose primary duty consists of the performance of teaching, tutoring, instructing, or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in the school system or educational establishment or institution by which he is employed.

8. 29 CFR Section 800.125.

function, which no aide would perform on males. Orderlies also set up oxygen tanks and performed several other functions not performed by aides. This justified a difference in pay, the Court said, and distinguished Brookhaven, supra, as follows (pg. 1258):

> In Brookhaven, where there was a larger number of orderlies than in the case at bar, the court found that both orderlies and aides were assigned equal numbers of patients, that the primary duties of aides and orderlies were the same, and that the secondary and tertiary duties which were thought to distinguish the jobs either did not differ significantly from the primary responsibilities or were performed by aides as well as orderlies.

In Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972), it was said a male employee at a stock desk did not perform tasks requiring greater skill and effort than those performed by females in exercising authority to add new items to inventory, establishing a data phone system, advising the purchasing agent of inactive inventory items, and in being responsible for the transfer of inventory items between the company's other branches.

Even where there is a special skill, greater pay for all hours worked is not proper if the skill is used for limited and identifiable times. Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. den'd. 398 U.S. 905, 90 S.Ct. 1696 (1970). But a wage differential is proper for the identifiable period during which the duty is performed. Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), aff'd. per curiam, 445 F.2d 823 (8th Cir. 1971).

EQUAL EFFORT

In Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), supra, the Court analyzed the meaning of "equal effort," as employed in the EPA, in these words (pg. 725):

> The equal effort criterion has received substantial play in the reported cases to date. As the doctrine is emerging, jobs do not entail equal effort, even though they entail most of the same routine duties, if the more highly paid job involves additional tasks which (1) require extra effort, (2) consume a significant amount of the time of all those whose pay differentials are to be justified in terms of them, and (3) are of economic value commersurate with the pay differential. We are persuaded that this approach to the application of the statutory "equal effort" criterion is in keeping with the fundamental purposes of the Equal Pay Act, and adopted here. Employers may not be permitted to frustrate the purposes of the Act by calling for extra effort only occasionally, or only from one or two male employees, or by paying males substantially more than females for the performance of tasks which command a low rate of pay when performed full time by other personnel in the same establishment.

To justify a pay differential because a job requires greater "effort," therefore, it is necessary to satisfy each of the three requirements set out above.

The administrative interpretation of the EPA defines "effort" as the measurement of mental as well as physical exertion needed for the performance of a job.[9] This concept was approved in Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), aff'd per curiam 445 F.2d 823 (8th Cir. 1971), where men did harder physical work but women operated certain high-speed presses which posed a constant risk of injury

9. 29 CFR Section 800.127

to the operator and thus required extreme mental alertness.[10]

A number of cases have considered the "equal effort" question in comparisons between the jobs of male and female custodians employed by educational institutions. For example, in Hodgson v. San Diego Unified School District, ___ F. Supp. ___, 21 WH Cases 123 (S.D. Cal. 1972), it appeared male custodians were operating and maintaining electric scrubbing and polishing machines, emptying heavy trash cans, moving heavy furniture, and climbing ladders to clean walls and windows and to replace ceiling lights. But the evidence showed female custodians were physically capable of operating the scrubbing and polishing machines, and did not do so only because of school policy. The evidence also showed they were responsible for collecting and emptying all trash and debris found in their work areas, and that many of the tasks they were expected to perform, such as carrying bags of wet towels, involved work just as "heavy" as that performed by male custodians. In finding a violation of the EPA, the Court said (pg. 127):

> The additional duties performed by custodians, including climbing high ladders, working on scaffolding, operating floor scrubbing and buffing machines * * *, do not require a degree of skill, effort and responsibility which differs in an appreciable way from that required of the matron custodians in the performance of their routine duties. Moreover, these additional duties performed by the custodians occupy only an insubstantial amount of each custodian's time.[11]

A useful summary of these general concepts appears in Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974), where it was said higher pay is not related to extra duties when one or more of the following circumstances exist: some male employees receive higher pay without doing extra work; female employees also perform extra duties of equal skill, effort, and responsibility; qualified female employees are not given the opportunity to do the extra work; the supposed extra duties do not in fact exist; the extra task consumes a minimal amount of time and is of peripheral importance; and third persons who do the extra task as their primary job are paid less than the male employees in question.

EQUAL RESPONSIBILITY

The administrative interpretations state that "responsibility" is concerned with the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation.[12]

In Hodgson v. Daisy Mfg. Co., 317 F. Supp. 538 (W.D. Ark. 1970), aff'd. per curiam 445 F.2d 823 (8th Cir. 1971), it was argued that since male press operators rolled containers of parts in the work areas (while female press operators did not), greater responsibility was required in that negligence in rolling containers of parts might result in lost time or accidents to others. But the Court said it was doubtful

10. See also Hodgson v. Oil City Hospital, Inc., 363 F. Supp. 419 (W.D. Penn. 1972), and Brennan v. Sterling Seal Co., 363 F. Supp. 1230 (W.D. Penn. 1973).

11. See also Hodgson v. Montana State Board of Education, 336 F. Supp. 524 (Mont. 1972), and Brennan v. Board of Education, Jersey City, New Jersey, 374 F. Supp. 817 (N.J. 1974).

12. 29 CFR Section 800.129

the possibility of carelessness by males while handling material came within the concept of job responsibility as defined in the administrative interpretation, supra.

In Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.), cert. den'd. 414 U.S. 822, 94 S.Ct. 121 (1973), males and females checking merchandise to be shipped against customers' orders performed equal work even though only males checked narcotics shipments, which entailed increased responsibility. The mechanical aspects of the task, however, merely required preparation of a few extra forms, and male and female checkers therefore performed equal work.

In Wirtz v. Muskogee Jones Store Co., 293 F. Supp. 1034 (E.D. Ok. 1968), a wage differential was held not improper where one male department head, in addition to the responsibilities he had in common with women department heads, was also in charge of the warehouse and home delivery.

In Brennan v. Victoria Bank and Trust Co., 493 F.2d 896 (5th Cir. 1974), it appeared the duties of a male exchange teller were more complicated than those of a female note teller, and were such that errors could not be easily corrected in the internal operation of the bank, while those of a note teller could be. In addition, an exchange teller had to keep informed as to the current rates of exchange, because an error there would be difficult to correct and the chance of loss to the bank was greater than with any duty of the note tellers. And even when a note teller temporarily took on the duties of an exchange teller, the particular exchange teller was not relieved of accountability and responsibility. Under all these circumstances, the Court found different pay justified.

Sometimes differences in the degree of supervision maintained over employees create differences in the "responsibility" they carry. In Wirtz v. Dennison Mfg. Co., 265 F. Supp. 787 (Mass. 1967), a wage differential was found proper when male employees were unsupervised one-half their shift and female employees were supervised throughout their entire shift. In other cases, the degree of supervision exercised by the employee can establish greater "responsibility."

SIMILAR WORKING CONDITIONS

There is no violation of the EPA if otherwise equal jobs are performed under dissimilar working conditions.

In Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223 (1974), the Supreme Court, in holding that a person working a night shift and doing the same work as a person on the day shift did not have different "working conditions," noted that Congress had deliberately used phrases in the EPA which had specific meanings in the language of industrial relations. "Working conditions" was one of these phrases, and it encompassed, in the language of industrial relations, two subfactors: "surroundings" and "hazards." "Surroundings," the Court said, measure the elements, such as toxic chemicals or fumes, regularly encountered by a worker, their intensity, and their frequency. "Hazards" take into account the physical hazards regularly encountered, their frequency, and the severity of injury they can cause.

As to the judicial meaning of "similar," it is less exacting than "equal," and in Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), aff'd. sub nom., Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973), it was said that work performed in essentially the same surroundings would not justify a

pay differential based on "dissimilarity" of working conditions.

Work performed by male and female custodians in different parts of a school building does not constitute dissimilar working conditions. Brennan v. Board of Education, Jersey City, New Jersey, 374 F. Supp. 817 (N.J. 1974).

In Hodgson v. Sears Roebuck and Co., ___ F. Supp. ___, 20 WH Cases 611 (W.D. Ken. 1972), it was said the mere fact jobs are in different departments of an establishment does not necessarily mean they are performed under dissimilar working conditions.

THE SAME ESTABLISHMENT

The EPA provides that no employer shall discriminate "within any establishment" on the basis of sex by paying wages "in such establishment" at a rate less than the rate at which he pays wages to employees of the opposite sex "in such establishment."

The EPA does not define the word "establishment," but the EPA is part of the FLSA, and the Supreme Court has interpreted the word, as used in the FLSA, to mean "a distinct physical place of business" rather than "an entire business or enterprise." Phillips, Inc. v. Walling, 324 U.S. 490, 65 S.Ct. 807, 810 (1945); Mitchell v. Bekins Van and Storage Co., 352 U.S. 1027, 77 S.Ct. 593, per curiam (1957).

In accordance with the foregoing, the administrative regulations (29 CFR Section 779.304) provide that the unit store in a chain operation constitutes the "establishment," not the individual departments within the store, and this interpretation was approved in Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), aff'd. sub nom. Brennan v. City Stores, Inc., 479 F.2d 235 (5th Cir. 1973).

However, in Hodgson v. Waynesburg College, ___ F. Supp. ___, 20 WH Cases 142 (W.D. Penn. 1971), a comparison between a male custodial employee working in one college building and female custodial employees working in several college buildings was held to be proper, since the college, the Court said, was a single "establishment" with each of its units functionally cohesive with the others. It appeared that fourteen females were variously employed in three women's residence halls and two men's residence halls scattered throughout a thirty-acre campus. The residence halls were an integral part of the defendant's overall operation, and administration, purchasing, maintenance, and related services and facilities were all handled centrally. Residents and personnel were allowed to transfer, in appropriate situations, between residence halls, and the college itself regarded each building on its campus as part of a single enterprise. After setting forth these facts, the Court said (pg. 145):

> Thus we are initially faced with the issue of whether comparison between a male working in one building and females working in other buildings is proper. Clearly if each building constitutes a separate establishment, such a comparison must fail.
>
> Issues such as this must be decided on facts of the particular case. The defendant college is constituted of numerous classroom, research, administration and residence buildings located on a thirty-acre campus in a rural community in western Pennsylvania. Defendant clearly regards itself as a single integrated operation maintaining centralized administrative, bookkeeping and personnel offices. Employees and students work and utilize all of defendant's facilities as if the confines of the campus set the outside boundry (sic) of a large building or distinct physical place of business. (Emphasis supplied).

The Court then cited the administrative interpretation of the term "establishment," as set out in 29 CFR

Section 779.23 (essentially the Phillips definition, supra), and said (p. 145):

> The official administrative interpretations of the Fair Labor Standards Act, while not binding on the courts, are entitled to be accorded "great weight," and the Court may properly resort to them for guidance * * *.
>
> This phraseology does not limit an "establishment" to a single building. An "establishment" may, in fact, consist of multiple buildings as indicated by two recent decisions under the Equal Pay Act. * * *
>
> The facilities of the defendant college constitute a functionally cohesive unit, and we therefore hold that the defendant is a single establishment within the meaning of the Act.

A similar result was reached in Brennan v. Board of Education, Jersey City, New Jersey, 374 F. Supp. 817 (N.J. 1974), where, in a case involving male and female custodians, job and pay comparisons were made throughout a school district consisting of 35 schools and an administration building, and the Court made a finding of fact that the school board viewed each custodial worker as working within one integrated school system, which constituted a distinct facility or place of business.

Although the concept of the "same establishment" was not an explicit issue in Board of Regents of the University of Nebraska v. Dawes, ___ F. Supp. ___, 9 EPD P9963 (Neb. 1975), comparisons of salaries of male and female faculty members and administrative employees at the university were apparently made by using the university's system-wide job-classification data on three different campuses and at a county experimental station connected with the College of Agriculture.

AFFIRMATIVE DEFENSES

Even though a plaintiff has proven all the elements required to establish a violation of the EPA, there is nevertheless no violation if it can be shown the difference in payments to men and women was made pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any other factor other than sex.[13]

Under these exceptions, a de facto seniority system justified higher payments to a male who had been hired two years before the female complainant in Kilpatrick v. Sweet, 262 F. Supp. 561 (M.D. Fla. 1967).

With respect to merit systems in general, in Rackin v. University of Pennsylvania, 386 F. Supp. 992 (E.D. Penn. 1974), it was said that material issues of fact as to whether a university violated the EPA by systematically discriminating against female faculty members regarding their pay solely on the basis of sex or whether the plaintiff's teaching job was within its exceptions because the pay of full, associate, and assistant professors was based on merit and the quality of their work products, precluded summary judgment.

In Brennan v. Goose Creek Consolidated Independent School District, ___ F. Supp. ___, 21 WH Cases 25 (S.D. Tex. 1975), the Court rejected a merit system because: (1) the employer had general guidelines but no specific criteria for determining which employees were better and where within a salary range an employee should be paid; (2) the merit raises had not been given female employees; and (3) the merit system and its operation had never been communicated to any of the involved employees. See also Hodgson v. Industrial Bank

13. 29 U.S.C.A. Section 206(d)(I).

of Savannah, 347 F. Supp. 63 (S.D. Ga. 1972).

In Wirtz v. First Victoria National Bank, ___ F. Supp. ___, 19 WH Cases 684 (S.D. Tex. 1970), aff'd. sub nom. Hodgson v. First Victoria National Bank, 446 F.2d 47 (5th Cir. 1971), approval was given a merit system in which officers and directors of the defendant bank held quarterly meetings for the purpose of evaluating employees, and officers in charge of the various departments expressed their views as to the competence, interest, and value to the bank of the employees in question.

Nevertheless, an employer cannot consistently hire women at a lower starting wage and then be immune to an EPA action because some women, after long periods of service, ultimately reach higher salary levels than men subsequently hired. With respect to such a practice, it was said in Hodgson v. American Bank of Commerce, 447 F.2d 416 (5th Cir. 1971), that (pg. 421):

> The mere presence of a few women in the upper part of the wage scale would permit widespread discrimination against women as a group. This could result automatically through general periodical increments added to a discriminatory starting salary, or deliberately through the selection of a few women for favorable treatment or a few men for unfavorable treatment--the result of which would be to give protective coloration to a generally discriminatory pattern. (Emphasis supplied.)

On the other hand, where there is a bona fide seniority or merit system but the starting wage is discriminatory, the seniority or merit system is not invalidated. Rather, the starting wage for affected employees has to be retroactively adjusted. Shultz v. Saxonburg Ceramics, Inc., 314 F. Supp. 1139 (W.D. Penn. 1970). Furthermore, the last wage an employer paid to each male employee is the minimum rate the employer is legally obligated to pay women performing substantially the same job under similar working conditions. Wirtz v. Meade Mfg., Inc., 285 F. Supp. 812 (Kans. 1968).

The fourth EPA exception, that of the payment of a differential based "on any other factor other than sex," has, by its very nature as a catch-all, generated the most litigation.

Under appropriate factual circumstances, prior work experience and superior formal education are factors which an employer is entitled to consider in establishing wage rates so long as these factors are applied without distinction as to the sex of the employees.[14] However, in Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), it was indicated that an employer must demonstrate the relevance of such factors as formal education to the duties the employees are called on to perform.

It has been held that the alleged higher employment costs for women as a group than for men as a group (with respect to unemployment compensation, workmen's compensation, and accident and health insurance) are not a "factor other than sex" for the purposes of justifying a wage differential.[15] Similarly, the fact that an employer's bargaining power is greater with respect to women does not make the power a "factor other than sex" within the meaning of the statutory exception. Brennan v. Victoria Bank and Trust Co., 493 F.2d 896 (5th Cir. 1974).

14. In Wirtz v. Citizens First National Bank, ___ F. Supp. ___, 18 WH Cases 472 (E.D. Tex. 1968), male employees who were college graduates were entitled to greater compensation than female employees who were not.

15. Wirtz v. Midwest Mfg. Corporation, ___ F. Supp. ___, 18 WH Cases 556 (S.D. Ill. 1968).

The employer in Hodgson v. Robert Hall Clothes, Inc., 473 F.2d 589 (3rd Cir. 1973), cert. den'd. sub nom. Brennan v. Robert Hall Clothes, Inc., 414 U.S. 866, 94 S.Ct. 50 (1973), however, qualified for the exemption even though salesmen in the men's department of its department store were paid more than saleswomen in the women's department.[16] The employer argued that the wage differential was based on economic factors, namely, the higher profitability of the men's department allowed it to pay the men more, and the lower profitability of the women's department forced it to pay the women less. The government, on the other hand, argued that "any other factor" did not literally mean any other factor, but rather meant any other factor other than sex which was related to job performance or was typically used in setting wage scales. Economic benefits to an employer, it argued, did not fall within this exception.

In rejecting the government's narrow interpretation of the statutory exception, the Court said (pg. 597):

> The overwhelming evidence which showed that the men's department was more profitable than the women's was sufficient to justify the differences in base salary. These statistics proved that Robert Hall's wage differentials were not based on sex but instead fully supported the reasoned business judgment that the sellers of women's clothing could not be paid as much as the sellers of men's clothing. * * *
>
> While no business reason could justify a practice clearly prohibited by the act, the legislative history set forth above indicates a Congressional intent to allow reasonable business judgments to stand. It would be too great an economic and accounting hardship to impose upon Robert Hall the requirement that it correlate the wages of each individual with his or her performance.[17]

In Manhart v. City of Los Angeles, Department of Water and Power, 387 F. Supp. 980 (C.D. Cal. 1975), it was said by way of dictum that a differentiation based on actuarial tables whereby women had to make larger monthly retirement-benefit contributions than their male counterparts could not qualify as a "factor other than sex."

Many of the "factor other than sex" cases involve employer training programs, which if bona fide and applied regardless of sex, can in appropriate circumstances justify unequal pay. But where a male employee has remained in such a program overlong, the courts have uniformly rejected the programs as violative of the EPA.[18] Where, in most instances, male employees supposedly in a training program were unaware any such management training program existed, no male employee followed a specific rotation in a written management training program, and no women, even those with college backgrounds and extensive working experience, had ever qualified as a management trainee, the program would not be considered bona fide.[19]

16. Only men were permitted to work in the men's department and only women were permitted to work in the women's department, but this was not in issue in the case. The trial court had found that the employer had a valid business reason for segregating sales personnel, i.e., "the frequent necessity for physical contact between the salesperson and the customer which would embarrass both and would inhibit sales unless they were of the same sex."

17. An opposite result was reached in Hodgson v. City Stores, Inc., 332 F. Supp. 942 (M.D. Ala. 1971), aff'd. 479 F.2d 235 (1973), where men in the men's department of a retail store received more than women in the women's and children's department. However, the employer did not allege, as did the employer in Robert Hall, that it made a higher profit on men's clothes than it did on women's and children's clothes.

18. Hodgson v. Fairmont Supply Co., 454 F.2d 490 (4th Cir. 1972); Shultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969).

19. Hodgson v. Security National Bank of Sioux City, 460 F.2d 57 (1972).

A training program which had never admitted women because women were not considered suitable for traveling was rejected in Hodgson v. Behrens Drug Co., 475 F.2d 1041 (1973), cert. den'd. 414 U.S. 822, 94 S.Ct. 121 (1973). In reply to the employer's argument that its training program was "bona fide" so long as it was executed in good faith without fraud, the Court said (pg. 1047):

> Although the traditional, common law definition of "bona fide" may be as liberal as Behrens' claims, * * * the term as used in the regulation at issue here must be construed in light of the statute which that regulation implements. The Equal Pay Act clearly mandates the demise of sex-based wage differences except in special, narrow circumstances. A bona fide training program to constitute a valid exception to the Equal Pay Act must represent more than an honest effort; such a program must have substance and significance independent of the trainee's regular job. (Emphasis supplied.)

In Shultz v. First Victoria National Bank, 420 F.2d 648 (5th Cir. 1969), the training program could not qualify as "bona fide" for purposes of the statutory exemption when the program was informal and unwritten; the rotation of a trainee through the various departments was unpredictable, sporadic, and unplanned, with the time spent in each department being based not on any concept of training but on the banks' personal needs; there was no definite understanding between the banks and their male employees concerning a training program; women were excluded from the program but followed a department-rotation similar to that of the male trainees; and male employees were started at substantially higher salaries than female employees performing the same tasks even though it was not known, at the time of hiring, which particular employees would be trained to be bank officers. After noting all these shortcomings, the Court said (pg. 657):

> Important as are the exceptions, to sustain these so-called training programs as a justification for disparate pay would mean that "the exception will swallow the rule." * * * And, this "rule"--equal pay for equal work--was not laid down simply out of concern about the injustice of discrimination, important as that was. It was also laid down out of concern about the economic and social consequences of disparate wages paid to a major portion of the nation's labor force. Such wages not only depressed the living standard of those who received them, they also depressed wages for all workers * * *.

CORNING

Ten years after the effective date of the EPA, the Court decided its first EPA case in Corning Glass Works v. Brennan, 417 U.S. 188, 94 S.Ct. 2223 (1974), thus resolving conflicts between the Second and Third Circuits.

The principle question posed was whether Corning violated the EPA by paying a higher base wage to male night-shift inspectors than it paid to female inspectors performing the same tasks on the day shift, where the higher wage was paid in addition to a separate night-shift differential paid to all employees for night work. Corning argued there was no violation because the night shift was a dissimilar "working condition." As noted earlier in this appendix, the Court held that the time of day an employee worked was not a "working condition" within the meaning of the EPA.

Corning also argued that even if a violation had occurred, it had been corrected in 1966 when night-shift jobs had been opened to women, and even if this had not corrected the violation, it had been cured in 1969 when the day and night base wages had been equalized, except for existing employees on the night shift who received a higher "red circle" base wage. In holding that neither of these corrective actions was sufficient to cure the violation, the Court said (pgs. 2233-35):

> But the issue before us is not whether the company, in some abstract sense, can be said to have treated men the same as women after 1966. Rather, the question is whether the company

> remedied the specific violation of the Act which the Secretary proved. We agree with the Second Circuit, as well as with all other circuits that have had occasion to consider this issue, that the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night inspectors. This result is implicit in the Act's language, its statement of purpose, and its legislative history.
>
> * * *
>
> The company's final contention--that it cured its violation of the Act * * * on January 20, 1969--need not detain us long. While the new agreement provided for equal base wages for night or day inspectors hired after that date, it continued to provide unequal base wages for employees hired before that date, a discrimination likely to continue for some time into the future * * *. We therefore conclude that on the facts of this case, the company's continued discrimination in base wages between night and day workers, though phrased in terms of a neutral factor other than sex, nevertheless operated to perpetuate the effects of the company's prior illegal practice of paying women less than men for equal work.

SUMMARY

The Equal Pay Act is intended as a broad charter of women's rights in the economic field, and it requires that women be paid the same for equal work as men. Thus, in Board of Regents of the University of Nebraska v. Dawes, ___ F. Supp. ___, 9 EPD P9963 (1975), it was said that a state university did not violate the EPA when, in seeking to comply with the EPA's requirements, it implemented a salary equalization formula by which the salaries of female faculty members and administrative employees were adjusted to bring them more into line with those of male employees. The fact that a formula for adjusting salaries was not applied to male employees did not amount to a violation in the absence of any evidence males were actually being paid less than their female counterparts.

The plaintiff has the burden of proving the employer pays different wages to employees of opposite sexes "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions" in the same establishment. The phrase "equal skill, effort, and responsibility" requires three separate tests. Once the plaintiff has carried this burden, the burden shifts to the employer to show the differential is justified by a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex.

"Equal work" means that the compared jobs must be "substantially equal," but the degree of "equality" necessary is difficult to define precisely and must be determined contextually. However, it is the job content and not the job title which is controlling. And a job performed by women on a day shift which is substantially equal to a job performed by men on a night shift must have the same base pay (though a "shift" differential is allowable).

"Equal skill" includes such factors as experience, training, education, and ability, and must be measured in terms of the performance requirements of the job. But even if the duties in two compared jobs are different, there can still be equal skill if the jobs are fundamentally similar. Even where special skills are required, a pay differential is not justified if this part of the job requires an insignificant amount of time. And if a differential is justified, it should be applied only to the indentifiable period during which the special skills are employed.

"Equal effort" includes mental as well as physical exertion, and to justify a differential it must be shown that the more highly paid job (1) requires extra effort, (2) consumes a significant amount of the time of all those whose pay differentials are to be justified in terms of it, and (3) is of economic value

commensurate with the pay differential.

"Equal responsibility" deals with the degree of accountability required in the performance of the job. Differences in the degree of supervision maintained over an employee, or differences in the degree of supervision he or she exercises, can sometimes justify such differentials.

"Similar working conditions" is a phrase given a liberal construction. Work performed, for example, by male and female custodians in different parts of a school building does not constitute dissimilar working conditions. The fact jobs are in different parts of a large establishment does not necessarily mean they are performed under dissimilar working conditions. And work performed on a night shift does not, when compared with the same work on the day shift, constitute different "working conditions."

The EPA does not define the meaning of the word "establishment," but courts have employed the meaning given the same word in the FLSA by the Supreme Court: a distinct physical place of business rather than an entire business or enterprise. Thus, a unit store in a chain operation would constitute the "establishment." On the other hand, different buildings in a small college and in a city school system have been considered the same "establishment" for purposes of comparing the pay of male and female custodial workers. And a large university recently made pay comparisons between faculty members and administrative personnel on different campuses for purposes of EPA compliance without having to meet the contention that the campuses were separate establishments. (This is not to say, however, that different campuses do represent the same establishment.)

An employer's affirmative defenses in support of an otherwise prohibited wage differential can be based on a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or any other factor other than sex.

De facto as opposed to formalized seniority systems can sometimes qualify, as can merit systems with specific criteria and a formalized procedure. But those having only general guidelines cannot. Merit systems unknown to the very employees involved are suspect.

Where there is a bona fide seniority or merit system and the starting wage is nevertheless discriminatory, the seniority or merit system is not invalidated, but the starting wage for affected employees has to be retroactively adjusted.

The fourth justification for a wage differential--any other factor other than sex--has, because of its catch-all character, produced the most litigation.

Under appropriate circumstances, prior work experience and superior formal education can be a "factor other than sex." But the employer has to show that the prior experience or the superior formal education is relevant to the job in question.

Higher employment costs for women as a group, however, are not a "factor other than sex." Nor is the fact women have a weaker bargaining position in the marketplace.

On the other hand, there has been judicial rejection of a narrow construction urged by the government, namely that a "factor other than sex" must always be a factor directly related to job performance or typically used in setting wage rates.

Employer training programs are frequently involved in "other than sex" litigation and can, if they are

substantially formalized and open to both sexes, justify a wage differential. But such programs cannot be sustained simply because they were conceived and executed in good faith if they are otherwise discriminatory, even without design.

APPENDIX R

RECONCILIATION OF TITLE VII AND THE EQUAL PAY ACT

The essential difference, of course, between Title VII and the Equal Pay Act is that Title VII covers all conditions of employment, while the EPA affects only compensation. Section 703(h) of Title VII[1] specifically takes cognizance of the EPA as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

In Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. den'd. 398 U.S. 905, 90 S.Ct. 1696 (1970), it was said (pg. 266):

> Although the Civil Rights Act is much broader than the Equal Pay Act, its provisions regarding discrimination based on sex are in pari materia with the Equal Pay Act. This is recognized in the provision of Section 703(h) * * * that an employer's differentiation upon the basis of sex in determining wages or compensation shall not be an unlawful employment practice * * * if the differentiation is authorized by the Equal Pay Act. Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of Section 703(h) would undermine the Civil Rights Act.

To like effect is Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971), where the Court, after citing Wheaton with approval, said that if a prima facie case of discrimination is established under Title VII, the burden of proof falls on the employer to prove that the differentiation was authorized by Section 703(h), that is, that it was authorized, for example, by one of the exceptions set out in 29 U.S.C.A. Section 206(d), such as a factor other than sex.

Again, in Hodgson v. Brookhaven General Hospital, 436 F.2d 719 (5th Cir. 1970), a case involving an equal pay question as to male hospital orderlies and female aides, it was said with respect to 42 U.S.C.A. Section 2000e-2(a)(2),[2] which declares it to be an unlawful employment practice to segregate or classify employees in any way that would deprive an individual of employment opportunities because of such individual's sex, that the Title VII provision and the EPA were interrelated, and that the two provisions must in some way be "harmonized." It was also noted that there was dictum in Wheaton to the effect that equal pay should be required for a "male" job and a "female" job which are in fact unequal if the reservation of the higher-paid job to males would be impermissible under Title VII. On the other hand, in Hodgson v. Golden Isles Convalescent Home, Inc., 468 F.2d 1256 (5th Cir. 1972), an EPA action the Court found that the jobs of a male orderly and a female aide were not substantially equal, but it declined to decide whether the job of orderly should be open to females, or whether the job of nurse's aide should be opened to males. Those questions, it said, had to be resolved in Title VII actions, and courts must be

1. 42 U.S.C.A. Section 2000e-2(h). See Appendix B.

2. See Appendix B.

cautious not to apply improperly one congressional act to achieve a purpose for which another act was intended.

In Hays v. Potlatch Forests, Inc., 465 F.2d 1081 (8th Cir. 1972), where an employer sought to invalidate, on the ground it discriminated against men in violation of Title VII, an Arkansas statute requiring the payment of a daily overtime premium to women but not to men, the Court instead chose to extend the overtime premium requirement to men, and in doing so, relied on a provision of the EPA requiring inequalities in pay to be corrected by raising the lower rate, not by lowering the higher rate.

And in Piva v. Xerox Corporation, 376 F. Supp. 242 (N.D. Cal. 1974), it was said (pg. 246):

> Title VII * * * overlaps, to some extent, the Equal Pay Act, the National Labor Relations Act, and the Railway Labor Act. In the early years of Title VII's existence, it was argued by those who sought to circumscribe the effect of the new law, that resort to federal courts under Title VII should be precluded by appropriate deference to other institutions already dealing with employment discrimination * * *. * * * These arguments, however, have been consistently rejected; and the clear principle has emerged that Title VII rights are independent of rights created by other statutes * * *, and that where remedies overlap, a plaintiff may select the avenue of relief that seems to him most appropriate. * * * Thus, in the instant case, where plaintiff's claim is cognizable under both the equal pay laws and Title VII, she may pursue her claim under the latter statute as part of a comprehensive action, if she so chooses, provided only that she fulfill the two jurisdictional prerequisites to the bringing of a Title VII suit, i.e., timely filing of a charge with the Commission and filing of suit within 90 days of notice from the Commission of the right to proceed.

In a recent case involving both Title VII and the EPA, Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir. 1975), the female plaintiff had been the head of the accounting department in an insurance agency employing forty people. The other departments, fire insurance, casualty insurance, and claims, were headed by men, who had been paid more. In addition, the male successor to the plaintiff as head of the accounting department, though having less experience, received almost the same salary.

The lower court had found that the success of the insurance agency depended on the efficient functioning of all its departments, and that the work performed by each department head was substantially equal. The appellate court agreed that all departments had to function efficiently but took issue with the concept all department heads were therefore performing substantially equal work. In a similar vein, it took issue with the proposition there was sex discrimination if the male succeeding the plaintiff as head of accounting received almost the same salary, absent evidence the work of the successor was inferior.

To establish a case under Title VII, the Fifth Circuit said (and it was obviously drawing on the language of the EPA), it must be proved that a wage differential was based upon sex[3] and that there was the performance of equal work for unequal compensation.

3. This qualification, however, is not necessarily an EPA requirement. Most EPA cases suggest that proof of a wage differential between men and women establishes the differential is based on sex.

APPENDIX S

EXCERPTS FROM TITLE IX, EDUCATION AMENDMENTS OF 1972,

AS AMENDED BY P. L. 93-568, Dec. 31, 1974

Title IX of the Educational Amendments of 1972, as amended by P. L. 93-568, Dec. 31, 1974 (20 U.S.C.A. Section 1681, et seq.), provides in part as follows:[1]

§ 1681

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex; and

(6) This section shall not apply to membership practices--

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

(b) Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, that this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such

1. The 1974 Amendment is shown by underlining.

program or activity by the members of one sex.

(c) For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department. (Title IX, § 901)

§ 1682

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. * * * Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law * * *. (Title IX, § 902)

§ 1685

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty. (Title IX, § 905)

§ 1686

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes. (Title IX, § 907)

APPENDIX T

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972

Title IX provides in substance that no person shall, on the basis of sex, be subjected to discrimination under any education program receiving federal financial assistance. With respect to admissions, however, Title IX applies only to institutions of vocational education, professional education, graduate higher education, and to public institutions of undergraduate higher education. (One-sex institutions changing to two-sex institutions have grace periods not material here, and traditionally one-sex public undergraduate institutions do not have to change present admission policies.) Title IX also exempts from its operation certain religious, military, and merchant marine educational institutions.

Regrettably, it has to be said that as of the time this study was in preparation, there were no officially reported cases dealing with this important legislative addition to the rights of women in education. This absence of cases is due in part to a delay in issuance of guidelines, in part to the normal delay between the initiation of a case and a decision on the merits, and in part, probably, to uncertainty as to whether aggrieved individuals have a right to sue under Title IX.

However, since Title IX is generally considered to be modeled on Title VI of the Civil Rights Act of 1964 (42 U.S.C.A. Section 2000d et seq.), it is appropriate to look to Title VI for guidance on the question of a private right to sue. In Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967), where black children sought injunctive relief against a school board, it was said (pg. 852):

> Section 601 states a reasonable condition that the United States may attach to any grant of financial assistance and may enforce by refusal or withdrawal of federal assistance. But it also states the law as laid down in hundreds of decisions, independent of the statute. In this sense, the section is a prohibition, not an admonition. In the absence of a procedure through which the individuals protected by section 601's prohibition may assert their rights under it, violations of the law, are cognizable by the courts. * * * The Negro school children, as beneficiaries of the Act, have standing to assert their 601 rights. (Emphasis supplied.)

Furthermore, in Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974), Chinese students brought a Title VI action to obtain courses in the English language, and even though neither the question of "right to sue" nor "exhaustion of administrative remedies" was in issue, the Court accepted the case and granted relief.

In addition to the December 31, 1974 amendment of Title IX noted in the previous appendix, Congress has enacted other legislation indirectly affecting Title IX, as follows:

1. In Section 844 of Title VIII of the Education Amendments of 1974, it directed the Secretary of Health, Education and Welfare to publish proposed regulations implementing Title IX not later than thirty days after the date of enactment of the Education Amendments (Aug. 21, 1974), which regulations were to include, with respect to intercollegiate athletic activities, "reasonable provisions considering the nature of particular sports."

2. In Section 509(a)(2) of Title V of the Education Amendments of 1974, Congress mandated that the HEW guidelines for Title IX be transmitted to Congress concurrently with their publication in the Federal Register, and directed that such guidelines would become effective not less than forty-five days after such transmission unless Congress, by concurrent resolution, disapproved a particular guideline or guidelines, in which case, it or they, as the case might be, would not become effective.

3. In late 1974, there was movement in Congress to pass an amendment prohibiting HEW requiring school systems to prepare or maintain records or statistics pertaining to the sex of teachers or students. As passed, however, in the Supplemental Appropriations Act, 1975 (P.L. 93-554), the amendment as amended, reads: "Provided further, That none of these funds shall be used to compel any school system as a condition for receiving

> grants and other benefits from the appropriations above, to classify teachers or students by * * * sex * * *; or to assign teachers or students to schools, classes, or courses for reasons of * * * sex * * *, except as may be required to enforce nondiscrimination provisions of Federal law."

As an incidental matter, supplementing the congressional action noted above with respect to intercollegiate athletic activities, it was said by way of dictum in Brenden v. Independent School District, 477 F.2d 1292 (8th Cir. 1973), that discrimination in high-school interscholastic athletics constituted "discrimination in education" within the meaning of Title IX.

In November, 1974, the Women's Equity Action League, the National Organization for Women, and other women's groups brought suit in the District of Columbia against HEW and the Department of Labor under Title IX and other laws, alleging an overall pattern of nonenforcement, as against educational institutions, of federal prohibitions on sex discrimination. Similar though not as sweeping suits have been instituted elsewhere.

TITLE VI ADDENDUM

Section 601 of Title VI of the Civil Rights Act of 1974 (42 U.S.C.A. Section 2000d) provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Many of the cases that have arisen under Title VI involve complicated racial segregation problems in no way related to the problems likely to arise under Title IX, but in view of the fact Title IX is generally modeled on Title VI, and that there are presently no officially reported Title IX decisions, the following Title VI cases are noted briefly in view of their possible applicability to Title IX situations.

The ultimate responsibility for determining the constitutionality of school desegregation plans rests with the Court, but the guidelines of HEW are entitled to considerable weight. Kemp v. Beasley, 352 F.2d 14 (8th Cir. 1965).

Though the provisions of Title VI are couched in declaratory terms and provide no explicit method of enforcement, the federal courts are not powerless to act. Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1969), rev'd. on other grounds 417 F.2d 321 (6th Cir. 1969), cert. den'd. 397 U.S. 980, 90 S.Ct. 1105 (1970), rehearing den'd. 397 U.S. 1059, 90 S.Ct. 1352.

In Board of Public Instruction of Taylor County, Florida v. Finch, 414 F.2d 1068 (5th Cir. 1969), consideration was given to a provision of Title VI authorizing termination of federal funding for failure to comply with Section 601 but limiting such termination to the "particular program, or part thereof" in which such noncompliance was found.[1] At issue was an HEW termination (after a finding that the school board's progress toward student and teacher desegregation was inadequate, and that the board was trying to perpetuate a dual school system) of all funding under three separate statutory grants for, respectively, the education of children of low-income families, the education of adults, and supplementary education centers.

1. Section 602 of Title VI (42 U.S.C.A. Section 2000d-1). Section 902 of Title IX contains similar language. See Appendix S.

HEW defended the blanket termination on the ground that the word "program" in this provision meant the school program as a whole. The Court, however, interpreted the word "program" in the particular provision to refer to the statutory grants and concluded that blanket termination was improper, since individual statutory grant programs might well be insulated from otherwise unlawful activities. Findings of noncompliance, in short, must be made for each such program; each was entitled to its day in court.

It is to be noted, too, that in HEW's first proposed guidelines for Title IX,[2] Finch is quoted (pgs. 1078-9) for the proposition that federal funds may be terminated upon a finding they "are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment * * *."

And since Finch did not interpret the meaning of the word "program" as used in Section 601, it is arguable that the prohibition on discrimination "under any program or activity receiving Federal financial assistance" in Section 601 (and by analogy, in Section 901 of Title IX)[3] has a broader remedial sweep than the carefully restrictive language of the Title VI provision authorizing a termination of funding. Under this reasoning, Section 601 (and Section 901 of Title IX) would prohibit discrimination in the overall educational program offered by a beneficiary of federal funds even though the federal funds could not be directly traced to a particular allegedly discriminatory part of the overall program.[4]

On the other hand, in McLeod v. College of Artesia, 312 F. Supp. 498 (N.M. 1970), black students claiming discrimination in their disciplinary suspension were denied an injunction under Title VI when there was no showing of a relationship between the alleged discriminatory practices and the college's use of approximately $53,000 of federal funds to support a work-study program.

In Adams v. Richardson, 480 F.2d 1159 (D.C. Cir. 1973), where it was said that HEW could not continue to channel federal funds to segregated school systems defaulting on their obligations under Title VI, the Court indicated that the judiciary would recognize certain practical difficulties HEW might face as it moved to implement the prohibitions of Title VI (pg. 1164):

> (W)e are also mindful that desegregation problems in colleges and universities differ widely from those in elementary and secondary schools, and that HEW admittedly lacks experience in dealing with them. It has not yet formulated guidelines for desegregating state-wide systems of higher learning * * *. As regrettable as these revelations are, the stark truth of the matter is that HEW must carefully assess the significance of a variety of new factors as it moves into an unaccustomed area. None of these factors justifies a failure to comply with a Congressional mandate; they may, however, warrant a more deliberate opportunity to identify and accommodate them.

In Goodwin v. Wyman, 330 F. Supp. 1038 (S.D. N.Y. 1971), aff'd. 406 U.S. 964, 92 S.Ct. 2420 (1972), it was said that essentially the same showing was required to establish a violation of Title VI prohibiting dis-

2. 39 Fed. Reg. 22,228 (1974).

3. Section 901 of Title IX uses the words, "education program or activity." See Appendix S.

4. In Lau v. Nichols, 414 U.S. 563, 94 S.Ct. 786 (1974), supra, the Court did not consider the meaning of the words "program or activity" as used in Section 601, but nevertheless found that the Chinese-speaking students were denied a meaningful opportunity to participate in the school district's "educational program." Relief was granted, however, substantially on the ground that the district, as a condition for receiving federal financial assistance, had agreed to abide by Title VI and the HEW guidelines. Those guidelines required a school district to take affirmative action where minority children were handicapped by an inability to understand English. See also Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1972), supra.

crimination under federally assisted programs on the ground of race, color, or national origin as was required to make out a racial discrimination violation of the equal protection clause.[5]

In Anderson v. San Francisco Unified School District, 357 F. Supp. 248 (N.D. Cal. 1972), a school district was enjoined from putting into operation a plan which would have granted virtually all administrative assignments, appointments, and promotions to minority personnel where the plan had not been shown to have been undertaken to correct past discrimination and where the effect of the plan would have been to give white, nonminority employees little opportunity for administrative positions or promotions.

5. Goodwin involved an attack on a state law regulating welfare.

APPENDIX U

COMPREHENSIVE HEALTH MANPOWER TRAINING ACT OF 1971

AND NURSE TRAINING ACT OF 1971

Each of these acts, among other things, amend Title VII and Title VIII, respectively, of the Public Health Service Act of 1944, as amended, to prohibit sex discrimination as indicated below:

42 U.S.C.A. § 295h-9

> The Secretary[1] may not make a grant, loan guarantee, or interest subsidy payment under this subchapter to, or for the benefit of, any school of medicine, osteopathy, dentistry, veterinary medicine, optometry, pharmacy, podiatry, or public health or any training center for allied health personnel unless the application for the grant, loan guarantee, or interest subsidy payment contains assurances satisfactory to the Secretary that the school or training center will not discriminate on the basis of sex in the admission of individuals to its training programs. The Secretary may not enter into a contract under this subchapter with any such school or training center unless the school or training center furnishes assurances satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs. In the case of a school of medicine which--
>
> (1) on the date of the enactment of this sentence is in the process of changing its status as an institution which admits only female students to that of an institution which admits students without regard to their sex, and
>
> (2) is carrying out such change in accordance with a plan approved by the Secretary,
>
> the provision of the preceding sentences of this section shall apply only with respect to a grant, contract, loan guarantee, or interest subsidy to, or for the benefit of such a school for a fiscal year beginning after June 30, 1979. (Title VII, § 799A)

42 U.S.C.A. § 298b-2

> The Secretary may not make a grant, loan guarantee, or interest subsidy payment under this subchapter to, or for the benefit of, any school of nursing unless the application for the grant, loan guarantee, or interest subsidy payment contains assurances satisfactory to the Secretary that the school will not discriminate on the basis of sex in the admission of individuals to its training programs. The Secretary may not enter into a contract under this subchapter with any school unless the school furnishes assurances satisfactory to the Secretary that it will not discriminate on the basis of sex in the admission of individuals to its training programs. (Title VIII, § 845)

There appear to be no officially reported cases involving these two sections, and since they speak for themselves, this appendix is limited to noting that they, too, are involved in the suit mentioned in Appendices P and T, brought in November, 1974 by various women's groups against the Department of Health, Education and Welfare and the Department of Labor for failing to enforce federal prohibitions against sex discrimination in educational institutions.

1. The Secretary of the Department of Health, Education and Welfare.

APPENDIX V

OTHER FEDERAL LAWS OF CONCERN TO WOMEN IN EDUCATION

The following federal laws, too recently enacted to have any judicial history, and therefore outside the scope of this study, can and will affect the rights of women in education:

Women's Educational Equity Act of 1974 (20 U.S.C.A. Section 1866)

Equal Credit Opportunity Act (15 U.S.C.A. Sections 1691 et seq.)

Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A. Section 1232g)

Employee Retirement Income Security Act of 1974 (variously codified in 29 U.S.C.A. Section 1001 et seq., the Internal Revenue Code, and elsewhere)

Equal Educational Opportunities Act of 1974 (variously codified in 20 U.S.C.A.)

Also outside the scope of this study are:

National Labor Relations Act (29 U.S.C.A. Section 151 et seq.)

Labor-Management Reporting and Disclosure Act of 1959 (variously codified in 29 U.S.C.A)

Fair Labor Standards Act (29 U.S.C.A. Section 201 et seq.), except as to the Equal Pay Act of 1963.

Age Discrimination in Employment Act of 1967 (29 U.S.C.A. Section 621 et seq.)

Emergency Insured Student Loan Act of 1969 (29 U.S.C.A. Section 1078a and elsewhere)

Student Loan Marketing Association (20 U.S.C.A. Section 1087-2, part of the Education Amendments of 1972)

Also outside the scope of this study are the many federal programs or enactments in which sex discrimination is prohibited by statute. In appropriate circumstances, these programs or enactments, because of their prohibition on sex discrimination, can enhance the rights of women in education. Solely for purposes of illustration, a few of these laws are listed below:

Federal program or statute	Sample of situation in which program or statute could apply to women in education
Urban Mass Transportation Act of 1964 (49 U.S.C.A. Section 1601 et seq.), sex discrimination prohibited in Section 1608	Section 1607b authorizes fellowships in urban transportation in public or private institutions of higher education; Section 1607 authorizes grants to institutions of higher education to carry out urban transportation research.
Omnibus Crime Control Act of 1970, as amended by the Crime Control Act of 1973 (variously codified in 42 U.S.C.A. and elsewhere), sex discrimination prohibited in section 3766	Section 3746 authorizes contracts with educational institutions for law-enforcement training, assistance to teachers, and grants for research in law enforcement.
Federal Water Pollution Control Act Amendments of 1972 (variously codified in 32 U.S.C.A. and elsewhere), prohibition on sex discrimination in note to Section 1251 in form of reference to Section 13, Pub. L 92-500	Scholarships authorized in Section 1261.

Comprehensive Employment and Training Act of 1973 (variously codified in 29 U.S.C.A. and elsewhere), prohibition on sex discrimination in Section 991

Section 881 authorizes grants to private nonprofit organizations for purposes of improving the methods of meeting manpower and training programs. Section 885 authorizes training for specialized and supervisory personnel.

Domestic Volunteer Service Act of 1973 (variously codified in 42 U.S.C.A. and elsewhere), sex discrimination prohibited in Section 5057

Section 4974 authorizes grants to encourage students in secondary, secondary vocational, and post-secondary schools to participate in service-learning programs.

END